TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 332.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JUNE 29, 1906.

(20,297.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from Knox circuit court	1	1
Indictment	2	1
Summons and return	5	3
Admission as to facts	6	3
Judgment	7	3
Order overruling motion for new trial, &c.	8	4
Order as to bill of exceptions, &c.	9	4
Motion for new trial	9	4
Bill of exceptions	10	5
Demurrer overruled	10	5
Jury waived, &c.	11	5
Judgment entered	11	5
Motion for new trial overruled	11	5
Appeal allowed	11	5
Judge's certificate	11	5
Transcript of evidence, &c.	12	6
Testimony of J. D. Main	12	6
John Parker	25	11
Agreement as to facts	26	12
Testimony of J. A. Owens	27	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 8, 1907.

	Original.	Print.
Motion for verdict for defendant	35	15
Opinion	35	16
Stenographer's certificate	38	17
Supersedeas bond	39	17
Clerk's certificate	41	18
Order submitting motion for oral argument	42	18
Motion for oral argument	42	19
Order granting oral argument	43	19
Argument and submission	44	19
Judgment	44	20
Opinion	45	20
Writ of error	60	26
Bond on writ of error	62	27
Stipulation that other cases abide decision herein	63	28
Clerk's certificate	64	28
Assignment of errors	65	29
Citation and service	66	29

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 27th day of April, 1906.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Knox Circuit Court.

Be it remembered that heretofore, to-wit: on the 6th day of May, 1905, the appellant by its attorney filed in the Clerk's office of the Court of Appeals of Kentucky a transcript of record, in words and figures as follows, to-wit:

Knox Circuit Court.

#1835.

COMMONWEALTH OF KENTUCKY
vs.
ADAMS EXPRESS COMPANY.

Schedule.

The Clerk will copy the indictment, all the orders in the case, the motion and grounds for a new trial, and this schedule.

ADAMS EXPRESS COMPANY,
By C. W. METCALF, *Attorney.*

2 Pleas before the Honorable H. C. Faulkner, Judge of the Knox Circuit Court, at the court house thereof, in the town of Barbourville, Kentucky, on the 11th day of April, 1905.

Be it remembered that on December 27th, 1904, the following indictments were returned by the Knox county grand jury, to-wit:

Knox Circuit Court, December Term, 1904.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
ADAMS EXPRESS COMPANY, J. A. OWENS, and WILLIAM DEDDEN, Defendants.

Indictment.

The grand jury of Knox county, in the name and by the authority of the Commonwealth of Kentucky, accuse J. A. Owens, William Dedden and the Adams Express Company, the latter being

a joint stock company and partnership engaged in and
3 doing business as a carrier under the firm name and style of Adams Express Company, of the offense of unlawfully selling, giving, loaning, procuring for and furnishing intoxicating, spirituous, vinous and malt liquors, and a mixture thereof, committed in manner and form as follows, viz: The said J. A. Owens, William Dedden and Adams Express Company, the latter being a joint stock company and partnership engaged in carrying on the business of a carrier of packages, goods, wares and merchandise by the method commonly known as express, the individuals comprising said firm and partnership company are to the grand jury unknown, but some or all of them are non-residents of this State, did in Knox county, Kentucky, on the 27th day of December, 1904, unlawfully and wilfully carry for and deliver to J. D. Main a parcel, package, shipment and quantity of intoxicating, spirituous, vinous and malt liquors, and the mixture thereof, less than five gallons, to be and which was paid for on delivery at Barbourville in said Knox county, same being at the time a shipment commonly known and called "C. O. D. Shipment," in violation of the provisions of an act of the General Assembly of the Commonwealth of Kentucky, prohibiting the sale of intoxicating, spirituous, vinous and malt liquors,
4 and the mixtures thereof, in quantities less than ten gallons in the counties of Knox and Whitley, approved April 15th, 1884, and in violation of the provisions of an act approved May 7th, 1886, and in violation of the provisions of an act approved March 10th, 1894, and in violation of the provisions of an act approved March 11th, 1902, said acts being known as the local option laws, and being in full force and effect in Knox county at the aforesaid place of Barbourville, the place of delivery aforesaid. The said J. D. Main paid to the said J. A. Owens the money for said liquor and shipment, the said J. A. Owens being at the time he accepted pay for and delivered same acting for said William Dedden and Adams Express Company as agent and in charge and control of the office of said Adams Express Company at Barbourville in said county, said shipment and delivery being made and done at the time by said J. A. Owens, William Dedden and Adams Express Company in the usual course of business of said Adams Express Company.

The place from which said shipment was made as aforesaid, and the name of the owner of said liquors and shipment for whom same was carried and delivered as aforesaid, are unknown to this grand jury, but same was a place other than Barbourville, Knox
5 county, Kentucky. Against the peace and dignity of the Commonwealth of Kentucky.

(Signed) WM. LEWIS,
Commonwealth's Attorney, 27th Judicial District of Kentucky.

Indorsement.

A True Bill,
C. N. SAMPSON, *Foreman.*

Received from the hands of the foreman of the grand jury and filed in open court. December 27th, 1904.

J. R. JONES, *Clerk.*

The Commonwealth of Kentucky; the Sheriff, Coroner, Jailer, Marshal, or Policeman of Kentucky, Greeting:

You are commanded to summon J. A. Owens, Wm. Dedden and Adams Express Company to appear in the Knox Circuit Court on the first day of its next April Term to answer an indictment for selling liquor found against them in that court.

Given under my hand, as clerk of said court, this 10th day of Feb'y, 1905.

J. R. JONES, *Clerk.*

6 *Returns.*

Executed May 28th, 1905, on Adams Express Company by delivering a true copy of summons to J. A. Owens, agent at B'ville; executed on J. A. Owens by delivering a true copy, Wm. Dedden not in Knox county.

W. W. BYRELY, *S. K. C.*
CHAS. BYRELY, *D. S.*

Knox Circuit Court, April Term, April 11th, 1905.

THE COMMONWEALTH OF KY., Pl'ff,
vs.
J. A. OWENS and J. A. CONNELL and J. O. OWENS and WILLIAM DEDDEN, Def'ts.

Liquor.

By agreement between Wm. Lewis on behalf of the Commonwealth, and C. W. Metcalf, attorney for Adams Express Company, etc., defendants:

It is admitted by the parties plaintiff and defendants that the packages of spirituous, vinous and malt liquors about which the indictment was made in this —, was received by the defendant Adams Ex-
7 press Company in Cincinnati, Ohio, in the usual course of business, and this fact is admitted in the trial of the above styled case without further proof of said fact.

Knox Circuit Court, April Term, April 11th, 1905.

THE COMMONWEALTH, Pl'ff,
vs.
ADAMS EXPRESS COMPANY, J. A. OWENS, WM. DEDDEN, Def'ts.

Liquor.

Judgment.

Came the parties and answered ready for trial. The defendant Adams Express Company by attorney produced and filed a demurrer

to the Indictment. The court having considered the said demurrer, and being sufficiently advised, overrules the said demurrer, to which ruling of the court the defendant Adams Express Company excep's. By agreement of pl'ff and def't Adams Express Company the court is to hear and determine this case without the intervention of a jury, and the court having heard the evidence and argument of counsel is of opinion, and so adjudged, that plaintiff the Commonwealth of Kentucky recover of the defendant The Adams Express Com-
8 pany the sum of Sixty Dollars ($60.00) and the cost of this prosecution, and case is dismissed as to the defendant J. A. Owen, continued for process as to the defendant Wm. Hedden.

Knox Circuit Court, April Term, April 14th, 1905.

THE COMMONWEALTH, Pl'ff,
vs.
J. A. OWENS and WM. DEDDEN and ADAMS EXPRESS COMPANY, Def'ts.

Liquor.

This day came the defendant Adams Express Company by its counsel, C. W. Metcalf, filed written grounds and moved the court to set aside its findings and judgment herein and grant a new trial, but the court being advised, overruled said motion, to which defendant excepted, and prayed an appeal to the Court of Appeals, — was granted on conditions that the record in the case be lodged in the clerk's office of said court within sixty days from this date.
9 The defendant thereupon produced and filed its bill of exceptions, which was allowed by the court, and signed by the judge, and filed as part of the record in the case, together with the transcript of the testimony as extended by Mrs. Cora S. Johnson, official court stenographer, and properly certified as such, and attested by the judge of this court, which transcript was filed in open court, and ordered to be made a part of the record in this case to be used on appeal without being copied into same.

Knox Circuit Court.

1835.

COMMONWEALTH OF KENTUCKY
vs.
ADAMS EXPRESS COMPANY, ETC.

Motion & Grounds for New Trial.

The defendant Adams Express Company moves the court to set aside the finding and judgment herein and grant it a new trial:
1st. Because the facts in evidence show that the shipment of the

whiskey was received by the said defendant as a common carrier in Cincinnati, Ohio, in the usual course of business, and delivered directly to the witness, J. D. Main, as a common carrier in the
10 usual course of business in Barbourville, Kentucky, and was therefore covered by interstate commerce regulations.

2nd. Because the finding is against the law and evidence.

ADAMS EXPRESS COMPANY,
By C. W. METCALF, *Att'y.*

Indorsed: Filed April 14th, 1905. J. R. Jones, Cl'k.

Knox Circuit Court.

1835.

COMMONWEALTH OF KENTUCKY
vs.
ADAMS EXPRESS COMPANY.

Bill of Exceptions.

Be it remembered that on the calling of this case for trial the defendant appeared by attorney and demurred to the indictment, and the same having been considered by the court was overruled, to which the defendant Adams Express Company excepted. The reading of the indictment was waived, and the defendants, Adams
11 Express Company and J. A. Owens, thereupon entered a plea of not guilty, and a jury was waived by the attorneys for the Commonwealth and for the defendant, and the law and fact submitted to the court for finding and judgment. The Commonwealth introduced on its behalf J. D. Main and John Parker, as witnesses, and the defendant J. A. Owens, and no other testimony was heard by the court on the trial. The court, upon the testimony, found the defendant Adams Express Company guilty, and fixed the fine at $60.00, and judgment was entered accordingly. The defendant Adams Express Company filed written grounds and moved the court to set aside the finding and judgment and grant it a new trial herein, but the court overruled said motion, to which the defendant excepted, and prayed and has been granted an appeal to the Court of Appeals, and now tenders this as its bill of exceptions, which is allowed, and signed and ordered to be filed as part of the record.

H. C. FAULKNER, *Judge.*

Indorsed: Filed in open court April 14th, 1905. J. R. Jones, Cl'k.

12 Knox Circuit Court.

1835.

COMMONWEALTH OF KENTUCKY, Plaintiff,
against
ADAMS EXPRESS COMPANY, &c., Defendants.

Transcript of Evidence.

Be it remembered, that on the calling of this case for trial the following evidence was heard and proceedings had:

J. D. MAIN, being duly sworn, testified as follows, in behalf of the Commonwealth:

Q. Were you before the grand jury of this court at its December Term, 1904?
A. Yes, sir.
Q. Were you acquainted with J. A. Owens at that time?
A. Yes, sir.
Q. Where did you reside at that time, and for twelve months prior?
A. Here in Barbourville.
Q. Before that term of court did you get any liquor from Mr. Owens and the Adams Express Company in this county?
A. I got a box of whiskey there that was delivered by ex-
13 press.
Q. Where did you get it from?
A. The depot here in Barbourville.
Q. What quantity of liquor did you get at one time?
A. A box with four quarts in it.
Q. Was that in this county?
A. Yes, sir.
Q. Less than twelve months before the December term, 1904?
A. Yes, sir.
Q. Did you pay for the whiskey?
A. Yes, I paid the C. O. D. charges, $3.85, I believe.
Q. To whom did you pay the charges?
A. The agent.
Q. J. A. Owens?
A. Any agent that was at work there.
Q. From what parties did you get the whiskey?
A. I think the brand of the whiskey was called the White Oak, and there were envelopes in the box giving the number of a lock box at Cincinnati; they came there addressed to me with $3.85 charges.
Q. That was the C. O. D. charges?
A. Yes, sir.
Q. You paid that to the agent at the Barbourville depot?
A. Yes, sir.
14 Q. Was Mr. Owens, at that time, the depot agent at Barbourville?

A. Mr. Owens acted as agent part of the time and part of the time he was off having his eyes treated.
Q. Did you order the whiskey?
A. No, sir.
Q. Did you know it was going to be shipped to you?
A. I did not.
Q. Did you authorize any company to ship the whiskey there to you?
A. Did not.
Q. Did the Adams Express Company have any authority from you in any way to bring the whiskey there?
A. No, did not.
Q. Is the Adams Express Company an express company here in connection with the depot here at Barbourville?
A. Yes, sir.
Q. Where did you get the packages from, what part of the depot?
A. There was a private room in the express office in the depot.
Q. Got it out of the express office?
A. Yes, sir.
15 Q. Do you know how it came there?
A. No, I notified the company that was shipping it once or twice not to ship it to me.
Q. Who did you notify?
A. That lock box.
Q. The White Oak Distillery Company?
A. I think it was; I have an envelope in my office; I think the whiskey was branded White Oak Distillery Company.
Q. Did the box which you got come to the depot in Barbourville by express?
A. I don't know that I was ever there when it came on the car, but I got it out of the express office. I would find out it was there in my name, and I would get it.
Q. Did you have any talk with Mr. Owens about it?
A. Yes, sir.
Q. What did you say about it?
A. The only conversation I remember was, that he would not deliver the whiskey to any party that it was not addressed to. I did not know who shipped the whiskey.
Q. At the time you got this package out of the depot and turned the money over to Mr. Owens, were there any other packages of whiskey there in the express office?
A. Yes, sir.
16 Q. How many did you see?
A. I saw a good many stacked up there.
Q. About how many at one time?
A. I don't know, but several.
Q. And you saw them at several different times?
A. Yes, sir.
Q. Was there any other express office there in connection with the Barbourville depot except the Adams Express office at the time you got the package?

A. Not to my knowledge.
Q. You say there were four quarts?
A. That is what there is supposed to be.
Q. Did they come in bottles?
A. Yes, sir.
Q. Anything in the boxes except the quart bottles?
A. Only envelopes and blanks for orders.
Q. Have you any of those envelopes?
A. I think so. I notified them not to ship in my name.
Q. You notified them at the lock box in Cincinnati?
A. Yes, sir.
Q. Any of those letters ever returned to you?
A. No, they had my return on the envelope.
17 Q. Do you know what became of the $3.85 which you turned over to the agent of the Adams Express Company in the depot?
A. I do not.
Q. Do you know from where the whiskey was shipped except what you have stated?
A. Nothing, only what I have stated; I don't know anything about where it was shipped from.
Q. Did you get any information from Mr. Owens as to how the packages came into the depot?
A. He said they came by express, and the express charges must be paid.
Q. Was there anything on the bottle, any brand or anything on the bottle, by which you could tell from where the bottles came?
A. I don't remember exactly how the bottles read; there came different boxes and different brands, but it seems to me like it was the Whiye Oak Distillery Co., Covington, Kentucky.
Q. Was there anything in the envelope or order blank by which you could tell where the whiskey was manufactured?
A. No, the envelopes only gave the post office, Cincinnati, Ohio.
Q. Have you any of the bottles in which the whiskey was shipped from the White Oak Distillery Company?
18 A. Yes, sir.
Q. What other parties, if any, were at work in the office there at the time you got the whiskey about which you have been talking?
A. Mr. Joe Owens.
Q. Where is Mr. Joe Owens now?
A. He is a brother to Mr. John Owens, and is at the depot, I suppose; and probably Tom Finn, he worked there, too.
Q. Who is the William Deddin that is mentioned in this indictment?
A. I don't know.
Q. Did you have any transaction with him?
A. I don't know, I don't have any recollection of ever knowing a fellow by that name.

Cross-examination:

Q. Did you ever use any of those return envelopes in ordering any whiskey from those people?

A. Never did.

Q. Did you ever order any boxes of whiskey from those people?

A. I did not.

Q. Did you ever authorize any one to do it?

A. I did not.

19 Q. How did you get information that the whiskey was there?

A. Very often I would send by some one to know if it was there, and then I would go and get it. I notified them once, and also got Mr. Jesse Tuggle to notify them not to ship any more.

Q. After you found out the whiskey was there on various occasions you would go and take it out?

A. Yes, and pay for it. Me and Tom Wilson and Tom Gilbert notified the parties not to ship any more in my name.

Q. Did you ever refuse a box of whiskey that was shipped to you?

A. I don't know how many was shipped to me; I have taken out several boxes.

Q. About how many did you take out?

A. I don't know; I may have paid out twenty boxes. I don't remember how many, in the latter part of the year 1904 and the earlier part of the year 1905.

Q. How much did each box hold?

A. Four quarts is what they are presumed to hold.

Q. So that in about six months you have taken out about twenty boxes?

A. I said in the end of 1904 and the earlier part of 1905 I had received that many. I would very often get George Tie to

20 bring over the boxes; he would bring it with other express, and I would pay him the money for the express and 10 cents in addition.

Q. To whom did you pay that?

A. George Tie.

Q. He was not the agent at the depot?

A. No, he runs the street car.

Q. He was the drayman, delivering boxes?

A. Yes, he delivered express.

Q. You paid him ten cents for delivering packages from the depot?

A. Yes; $3.85 was what I paid at the depot, and $3.95 is what I paid him.

Q. Do you mean to say that you were buying this from the drayman?

A. No, sir.

Q. You mean to say you were buying it from the agent?

A. No, sir.

Q. What do you mean?

A. I mean that I paid the required charges as shown on the boxes.

Q. How came those people to ship you this whiskey?
A. I don't know, sir.
21 Q. You say that you took it out every time that it was shipped to you?
A. I did not say that. I said I had taken out several boxes, but don't know that I took out near all the boxes shipped, I don't think I did.
Q. Will you be certain about that?
A. That is simply my opinion.
Q. Did you ever order a box returned?
A. I notified the company not to ship any more to me.
Q. Did you ever order the agent there to return a box that was shipped to you?
A. It seems like I have, probably two years ago.
Q. Have you in the last six months?
A. No, I think not.
Q. In the last twelve months?
A. I will not be positive about that; I know that I never ordered the boxes from either of those companies; it is inferior whiskey.
Q. Yet you took the boxes out every time?
A. I don't think I took them all out.
22 Q. You will not swear that you took them all out that came in your name?
A. I don't know that I can confidently, but I feel pretty confident that I did not.
Q. Were those boxes labeled or directed to you, J. D. Main, Barbourville, Kentucky?
A. Yes, sir.
Q. Did you ever get a box from Mr. Owens, or any other agent of the Adams Express Company, that was not shipped to you?
A. Mr. Owens, as I told you awhile ago, said that he could only deliver boxes to the man to whom they were addressed.
Q. Did he or not deliver to you only the boxes which were addressed to you?
A. That is all I got; that is all Mr. Owens ever delivered to me.
Q. Did you always get this whiskey from the White Oak Distillery Company?
A. There came whiskey here from other companies.
Q. What companies?
A. I don't know, but the most of the whiskey came from the White Oak Distilling Company.
23 Q. From what other persons did you ever get any whiskey?
A. I cannot mention all I got whiskey from.
Q. I mean C. O. D. shipments since this last law was in force?
A. I have no recollection.
Q. Did you ever get any from the Lone Creek Distilling Company?
A. I don't know that company.
Q. Did you get any from Crigler & Crigler?
A. There came some boxes, but I did not order any.
Q. Did you get them?

A. I don't remember whether I got them out; the fact is, I generally get my whiskey from J. D. Dantz.
Q. How much have you gotten from J. D. Dentz?
A. I don't remember; before Christmas I have gotten two or three boxes.
Q. How much did you get before that?
A. I don't remember.
Q. As much as ten gallons?
A. I cannot tell.
Q. Have you gotten as much as five gallons?
A. I am pretty confident that I have gotten that much in six months.
Q. As much as ten gallons?
A. I think not.
24 Q. Making five gallons from J. D. Dentz and 20 boxes from these other people?
A. I don't want the stenographer to say that I got five gallons or twenty boxes, that is Mr. Metcalf's statement. I am confident that in 1904 and 1905 I got that many boxes, and gave the statement for those years. It has been some time since I have gotten any White Oak boxes; I don't know whether there is any there for me now or not.
Q. Did any person in town tell you whether there were boxes there?
A. Yes, Mr. Tom Wilson told me, and I would ask this drayman to see if any was there, and I would send for it, or go for it, when I wanted it, and pay for it, and I believe Mr. Owens has notified me a time or two of the express being there.
Q. You would go and get it?
A. Yes, sometimes.
(JUDGE:) You have some theory about how this whiskey came to be sent you?
A. I have not the least idea. I have heard that there was some fellows around here, especially one of the Wests, who would get these names and send them in there. Charley Tinsley told me that this fellow got $86.00 on boxes he had sent here.
25 Q. What West is that?
A. Some call him Charley Atkins, and some West; that is the way I understood the whiskey was shipped here by some fellow sending off the names; all I know about that us that I have heard it.

JOHN PARKER, called for the Commonwealth, being duly sworn, testified as follows:

Q. What position, if any, do you hold in Knox County?
A. County Court Clerk.
Q. How long have you held that position?
A. Seven years and a few months.
Q. How long have you been living in Knox county?
A. Thirty-three years.
Q. As clerk of the Knox county court have you in your custody or in the office of the clerk of Knox county court any record showing

whether or not there has been any local option election held in Barbourville, Knox county, at any time previous to 1904, prior to the December Term of this court, 1904?

26 At this point it is agreed by counsel for the Commonwealth and counsel for the defendant that heretofore, to-wit: some two years ago, there was an election in the city of Barbourville on the question as to whether or not spirituous, vinous and malt liquors should be sold therein by retail, which election was legal in every particular, and the vote thereon was by a majority against the sale of liquor in any manner in said town by retail, and by virtue of what is known as the local option law has been in force and was at the time of the action complained of. And by further agreement of the parties it is agreed that the defendant Adams Express Company is a joint stock company, and was at that time. It is further agreed at this point that the whiskey about which the witness testified was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier, and carried by it to Barbourville, Kentucky, by the method commonly known as C. O. D.

The Commonwealth here rests.

27 J. A. OWENS, called for defendant, being duly sworn, testified as follows:

Q. You have heard the witness, J. D. Main, testify in reference to receiving a package of whiskey from the office of the Adams Express Company at Barbourville, at which place you were agent, by a method known as C. O. D. delivery; tell the court whether or not he did receive such whiskey?

A. Yes, he has received some.

Q. About how often has he received any?

Q. He has gotten several in the last year.

Q. Did you have anything to do with that whiskey being shipped to him?

A. No, I did not.

Q. Did you know anything about the fact that that whiskey was going to be shipped to him before it was shipped?

A. No, I did not.

Q. When was the first knowledge received by you that a C. O. D. package was in the care and custody of the Adams Express Company to be delivered to him?

A. When the box was put off of the train at Barbourville.

Q. Did you notify Mr. Main of the receipt of that package?

A. I don't believe I have; I don't believe I ever notified him.

28 Q. What is your custom with reference to notifying people about packages?

A. It is the rule of the company to notify the people in two or three days.

Q. Do you always do that?

A. Not always; the business is so heavy I have not time generally.

Q. Did Mr. Main come and receive these packages?
A. Yes; he received some himself, and some were sent down town to him.
Q. How many packages did Mr. Main receive?
A. I don't know.
Q. About how many?
A. I don't know; I suppose he got ten or fifteen boxes.
Q. Did you ever deliver to Mr. Main any whiskey which was not shipped to him?
A. No, I did not.
Q. Where was this whiskey which you delivered to him billed from?
A. Cincinnati.
Q. Do you know from whom that whiskey was received?
A. No, I do not; only from the C. O. D. labels.
29 Q. Now explain to the court how that whiskey was billed, what information you received from the *weigh*-bill, from whom it is received, and to whom the money goes?
A. The boxes come in with the express *weigh*-bill telling what amount was to be paid, from Cincinnati, Ohio, to Barbourville, Kentucky, and with that is the C. O. D. wrapper which the money goes back in; the wrapper in which we return the money after the package is delivered goes to the Distillery or the agent for the Distillery.
Q. Where were these collections which you made of Mr. Main returned to?
A. To Cincinnati.
Q. To what person?
A. Some of them, I believe, to the White Oak Distillery, and some to William Dedden.
Q. Can you produce one of the envelopes?
A. Yes, we have them at the office; we don't have any of Dedden's envelopes; he is out of business, I think.
Q. When did he go out of business?
A. I don't know that he is out of business, but I know we returned all his boxes that were not delivered.
30 Q. Did you ever deliver any whiskey to the witness, J. D. Main, which was accompanied by any *weight* bill from any point in this State—C. O. D. packages?
A. Never did.
Q. Did you or the Adams Express Company, or you as the agent of the Adams Express Company, have any arrangement with the White Oak Distillery Company or any other concern by which it would ship an open order of whiskey to Mr. Main or any other person?
A. No, I have not had any such arrangement as agent for the company.
Q. Have you had personally?
A. No, sir, I have not.

Cross-examination:

Q. You don't know what arrangement, if any, the company had?

A. No, I never had any notice of any arrangement.

Q. You don't know where the whiskey was manufactured, or where it was shipped from, except from the C. O. D. packages by which you returned?

A. I know the whiskey was shipped from Cincinnati to me, and that is where I returned the money.

31 Q. You don't know whether it was manufactured in Covington or some point in Kentucky and sent to Cincinnati and shipped back in this State?

A. No, sir.

Q. Do you know anything about William Dedden, the person who shipped this?

A. No, only the money I returned on his shipments.

Q. You don't know whether he is in connection with the White Oak Company?

A. No, sir.

Q. You don't know where the White Oak Distillery Company is located?

A. No, sir.

Q. At the time Mr. Main speaks of, you were the agent of the Adams Express Company, and in charge of their business here in Barbourville?

A. Yes, sir.

Q. And the money which he paid you you returned to William Dedden?

A. Yes, sir.

Q. You don't know how they happened to be sending the whiskey to him without an order?

A. No, I do not.

32 Q. About how many packages such as you delivered to him did you have in the depot at any one time during the year next before the December Term of this court, 1904?

A. We had several, as high as fifty at a time.

Q. How long has this whiskey package business been carried on by the Adams Express Company through the depot here at Barbourville?

A. As long as I have lived here—14 years.

Q. Is it yet being carried on by the Company?

A. Yes, sir.

Q. To how many different parties would there be packages of this whiskey in the depot at one time?

A. There would be quite a number sometimes.

Q. I understood you to say that you did not notify the parties of the packages being there?

A. I don't remember notifying them of the whiskey packages, they come in so fast I cannot notify them.

Q. Such an extensive business?

A. Yes, sir.

JUDGE: Is this delivery still going on?

A. Yes, sir.
33 Q. Still coming in?
A. Yes, sir.
Q. About how many C. O. D. packages are there in the depot at this time similar to what Mr. Main speaks of?
A. Ten or twelve, I believe.
Q. Is it not a fact that during the time you have been here as agent of the Company that whiskey dealers from other points outside of Knox county have carried on a sale of whiskey through the Adams Express Company here at Barbourville?
A. I don't know that there is anything of the sort.
Q. Have you not been delivering this whiskey regularly for the 14 years that you have been here?
A. Yes, sir.
Q. It has been going on from day to day and week to week?
A. Yes, sir.
Q. And in quantities less than five gallons?
A. Yes, sometimes.
Q. Mostly in gallon boxes, such as Mr. Main speaks of?
A. Yes sir.
Q. The Express Company's agent receives the money and returns it to the shipper?
A. Yes, sir.
34 Q. Has there been any whiskey handled at the depot except the whiskey that is shipped there from other points outside of Knox county?
A. No, sir.
Q. You handle no whiskey there except in that way?
A. No, sir.
Q. You don't know anything about William Dedden?
A. No, nothing except what we have got on our books.

Re-direct examination:

Q. You don't mean to say to the Commonwealth attorney by implication that there were any other C. O. D. packages in the depot from within the State?
A. No, sir.
Q. All the shipments which you deliver come from points outside of the State?
A. Yes, sir.
Q. Did you ever return any packages addressed to J. D. Main?
A. I believe I have.
Q. Since when?
A. I returned some a week or so ago, a package that remains on hand thirty days we return them.
35 Q. Did that ever occur before?
A. I don't remember of ever returning any before.

At the conclusion of the defendants' testimony the defendant Adams Express Company, by C. W. Metcalf its counsel, moved the court to find the defendant not guilty, upon the grounds that the

transactions embraced in the indictment were interstate commerce, and the court being advised, overruled said motion, to which the defendant objected and excepted; and thereupon the court delivered the following opinion.

Opinion and Judgment in Case #1835.

In all these cases it is shown by the evidence that the witness to whom the liquor was consigned made no order therefor, either through the agent, by letter or otherwise, to the company or person sending the shipment. It is shown in the evidence that the shipment was made C. O. D. from Cincinnati, Ohio, and in the regular course of business as far as the reception and shipment of the goods was concerned by the Adams Express Company and that there was never any contract between the buyer and the seller made in the
36 State of Ohio or anywhere else, except such as was made with the agent of the company in this State at the point of delivery. Counsel for defendant in the argument cited the case of the American Express Company, &c. *v.* State of Iowa, 196 U. S.; this is a very late case, and is strongly persuasive of the contention of the defendant. No case is cited under the Statute of this State, which Statute is commonly known as the Faris Law. Sub-section 4 of section 2557 B of Kentucky Statutes provides that all shipments of spirituous, vinous and malt liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful, and shall be deemed a sale of liquor at the place where the money is paid and the goods delivered; the carrier and his agent delivering and selling such goods shall be liable jointly with the vendor thereof. There is no question but that this section of the Statute of which it is *and* amendment are both in force in this county and the district in which this liquor was delivered.

I am of the opinion that the State has the power and should have the power as a police regulation to prevent this kind of ship-
37 ments. If I had any doubt on this subject, I think the facts in this case differentiate it from any case cited, or of which the court has knowledge.

It cannot be contended under the facts in this case that there was even a simulation of a contract between the buyer and the seller outside of this State; nor was there anything directly or indirectly tending to make the packages which were received in this case sales embraced by the interstate commerce. The defendant company claims that the shipment in this case was received in Cincinnati in the due course of business. It was claimed by the company that it had no knowledge of the fact that there was no contract between the seller and the buyer; that it first received the knowledge of this fact on the trial of this case, and so far as the evidence shows this is true; still, the court thinks that it should be bound in this case to know the facts that actually existed, and that it must be held to know the facts previously existing between the buyer and seller, if any; and even if the product delivered in this case was protected by

interstate commerce, still when the company, as in this case, becomes the shipper and deliverer for a company that has no
38 contract, the company then becomes a mere seller of liquor at the point of delivery. To hold otherwise, would be to allow this Company, through its office at Barbourville, to become a common retail dealer of liquor in our midst, and thus violate the law, and make it an exception to the general rule, which prevents other persons and corporations from selling liquor in our midst.

The Commonwealth does not insist on a verdict against the agent, and none will be rendered against the agent.

The judgment in this case will be for Sixty Dollars ($60.00).

And to this judgment the defendant excepts, and prays an appeal to the Court of Appeals, which is granted.

H. C. FAULKNER, *Judge.*

STATE OF KENTUCKY, *County of Knox, set:*

I, Cora S. Johnson, Official Stenographic Reporter for the Knox Circuit Court, certify that I took stenographic notes of the evidence in the above styled case, and that the foregoing pages of type-
39 written matter constitute a full, true, accurate and correct transcript of said notes when extended into longhand, together with the objections, exceptions and rulings of the court, and the opinion and judgment.

Given under my hand this, the 14th day of April, 1905.

CORA S. JOHNSON,
Official Stenographic Reporter,
Knox Circuit Court.

Examined and approved April 14th, 1905, by the trial judge.

H. C. FAULKNER, *Judge.*

Supersedeas Bond.

The bond is only required to be signed by the sureties.

1835.

ADAMS EXPRESS COMPANY, Appellant,
against
COMMONWEALTH OF KY., Appellee.

Upon an Appeal from a Judgment of Knox Circuit Court, Rendered 11th day of April, 1905.

Whereas, said appellant, Adams Express Company, has prayed an appeal from the Judgment of the Knox Circuit Court, rendered on the 11th day of April, 1905, against it in favor of the
40 appellee for the sum of Sixty Dollars, and the appellant desires to supersede the whole of the said judgment above mentioned:

Now, We, Adams Express Company, Principal, and C. W. Metcalf, its Surety, do hereby covenant to and with the appellee Commonwealth of Kentucky that the appellants will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the judgment above stated in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding in amount or value said judgment aforesaid.

Witness our hands, this 22nd day of April, 1905.

ADAMS EXPRESS COMPANY,
By C. W. METCALF, *Att'y.*
C. W. METCALF.

Attest:
J. R. JONES.

41 STATE OF KENTUCKY, *County of Knox:*

I, J. R. Jones, Clerk of the Circuit Court in and for the county and State aforesaid, certify that the foregoing eight pages of typewritten matter are a true and correct and complete transcript of the record and proceedings had in trial of the action lately pending in the Knox Circuit Court, wherein the Commonwealth of Kentucky was plaintiff, and the Adams Express Company and others were defendants, as appears in the records of my office.

Witness my hand this 21st day of April, 1905.

J. R. JONES, *Clerk.*

42 Be it remembered that on the 18th day of September, in the Court of Appeals, at the Capitol at Frankfort, the following order was entered:

"ADAMS EXPRESS COMPANY
v.
COM'LTH.

(5 cases.) Knox.

Came the appellant by counsel and filed grounds and moved the court to grant an oral argument herein, which motion is submitted.

The grounds for oral argument referred to in the foregoing order are in the following words and figures, to-wit:

Kentucky Court of Appeals.

No. 71.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Motion for Oral Argument.

The appellant moves the court for an oral argument of this case, on the ground that it involves a Federal Constitutional question not heretofore decided in Kentucky.

43 It presents the question whether a common carrier engaged in interstate commerce is amenable to the laws of Kentucky and guilty of selling liquor therein if it carries a shipment of liquor C. O. D. from the State of Ohio to the State of Kentucky, and there delivers it to the consignee who has not ordered it, when the fact of its not having been ordered is unknown to the carrier. It is a question similar to that discussed in American Express Company *v.* Iowa, 196 U. S., 133.

MAXWELL & RAMSEY,
Attorneys for Appellant.

And afterwards on the 20th day of September, 1905, at a Court of Appeals, at the Capitol at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS COMPANY
v.
COM'LTH.

(5 cases.) Knox.

The court being sufficiently advised, appellant's motion for oral argument herein is sustained, and said cases are passed for oral argument to the next January term.

44 And afterwards, on the 9th day of March, 1906, at a Court of Appeals, at the Capitol at Frankfort, the following order was entered, to-wit:

"ADAMS EXPRESS COMPANY
v.
COM'LTH.

(5 cases.) Knox.

SAME
v.
SAME.

(3 cases.) Laurel.

The foregoing cases coming on to be heard, were argued by L. Maxwell, Jr., for the appellant, and N. B. Hays, Attorney General, for the appellee, and submitted.

And afterward, on the 27th day of April, at a Court of Appeals, at the Capitol at Frankfort, the following judgment was entered:

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee.

Appeal from Knox Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed,
45 and that the appellee recover of the appellant ten per cent. damages on the amount of the judgment superseded herein, which is ordered certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said date the following opinion was delivered:

Court of Appeals of Kentucky, April 27, 1906.

(To be Reported.)

(Case #1835.)

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Knox Circuit Court.

Opinion of the Court by Judge Barker.

The appellant was indicted by the grand jury of Knox county, Kentucky, for a violation of the prohibition law prevailing
46 therein. The indictment contains much surplusage with reference to what is called the C. O. D. statute, and as to the manner in which the Adams Express Company received the whiskey said to have been sold by it in contravention of law. Stripped of all unnecessary verbiage, the indictment contains a statement sufficient to charge the defendant company with a sale of liquor by retail, in violation of the prohibition statute applicable to Knox county; and as to the unnecessary allegations, they may be dismissed from view under the shelter of the maxim *utile, per inutile non vitiatur.*

The defendant company pleaded not guilty, and the case was submitted to the court on the law and facts—the intervention of a jury being waived—resulting in an adverse judgment against it.

The evidence showed, for the Commonwealth, the delivery by the defendant's agent, J. A. Owens, to one J. D. Main, of a gallon of whiskey, for which he paid three dollars and eighty-five cents, which

the agent at once transmitted to the shipper of the whiskey in Cincinnati; also that Main did not order the whiskey, and did not know the name of the consignor, but it was shipped to him at Barbourville,
Knox county, Kentucky, from Cincinnati by the Adams Ex-
47 press Company, C. O. D. This is but a small part of a general system prevailing, by which unscrupulous dealers in whiskey undertake, through the facile aid of express companies, to evade the prohibition laws in effect in certain counties in the State, and retail liquor therein in violation of the laws forbidding such traffic. By this system the names of men accustomed to drink whiskey are obtained by the dealers, and then, without any order therefor, or any contract whatever, the whiskey in gallon packages is sent to various small towns throughout the prohibition counties, addressed to the parties whose names are thus acquired. The express company does not notify the involuntary consignee, but simply holds the whiskey in its ware-rooms, and the party in whose name the liquor has been expressed receives notice either by postal from the consignor, or by some local agent of his in the county, that there is an express package for him, and then, whenever the thirst for liquor becomes sufficiently strong to tempt him to pay the express charges and take it out of the express office, this is done. The name of the consignor is not known by the involuntary consignee, and the address for the return of the money is the number of a lock box in the Cincinnati post office. After the involuntary consignee becomes suffi-
48 ciently acquainted with the system existing between the consignor and the express company, he finds that a gallon of liquor is usually kept at the express office subject to his order and the payment of charges, and he goes there for it with the same confidence that he would go to an ordinary dealer.

The evidence in this case shows that, within six months next before the trial, J. D. Main had taken from the Adams Express Company's office at Barbourville, Kentucky, as many as twenty separate packages of whiskey of a gallon each, and the testimony of the express agent shows that he often had as many as fifty gallons of whiskey on hand at on time consigned to various parties under the same system. Frequently several parties club in and take out whiskey together, dividing it in proportion to the amounts paid in by each, it being a rigid rule of the defendant company never to deliver the whiskey to any person other than the named consignee. It was stipulated between the Commonwealth and the defendant, that the whiskey in question was shipped from Cincinnati in the ordinary course of the express business.

49 The first and crucial question in this case is, whether or not the shipment and delivery of the whiskey was an act of interstate commerce? If so, it may be conceded that the defendant should go acquit; if not, it is practically conceded, that the acts of the defendant constituted a sale of liquor in Knox County, in violation of the prohibition law.

We do not think the amendment of the prohibition law commonly denominated the "Farris" or "C. O. D." law, has any bearing upon

the merits of the offense under discussion. The learned counsel for appellant hinge the whole defense on the fact that the act of the express company constituted the carrying on of interstate commerce, and the C. O. D. Law, being an attempt to regulate interstate commerce, which admittedly is under the exclusive regulation of the Congress of the United States, is for that reason void. This may be conceded. However, if the C. O. D. amendment was stricken from the statute book entirely, it would not affect in any way the merits of the transaction under investigation as we see it. The prohibition statute, without the amendment, forbids, under penalty, the sale of liquor by retail in Knox county; but neither the statute itself, nor the amendment thereto, undertakes to regulate interstate com-
50 merce. No State statute can affect interstate commerce, and the legislature did not attempt so to do by that in question.

We do not agree to the proposition that the transaction, which took place between the express company and J. D. Main in Knox county, was interstate commerce. Nor do we agree with the Attorney General in his view of the effect of the Wilson Bill upon the transaction in hand. As we understand him, he insists, that, although the shipment from Cincinnati be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept over time in a wareroom, then the transaction ceases to be one of interstate commerce, and becomes one of local commerce. We do not understand the Wilson Bill, as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided in the various cases cited in the briefs of counsel, that, where whiskey is purchased in a foreign State, it may be shipped by the seller to the buyer, into a State where the sale of liquor is prohibited by law; that it is
51 interstate commerce unaffected by the local law until delivered to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refused to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the consignee. If the transaction be interstate commerce originally, it continues so until the goods are delivered into the hands of the consignee.

But was this transaction interstate commerce? No contract of purchase is even pretended to have been made in Cincinnati. So far as the consignor is concerned, he simply shipped his illegitimate goods into the State of Kentucky to a point where the prohibition law prevails, and through the instrumentality of the express company there made a sale to J. D. Main. No one disputes, or can dispute, that the transaction, so far as the consignor was concerned, was

illegitimate and in violation of the law. He shipped for-
52 bidden goods into a prohibition district of Kentucky for the chance of being able to sell it, after it reached its designation, to Main. So far as he is concerned, the transaction in substance is the same as if he had brought the whiskey himself to Barbourville, and there sold it to Main. This being true, the transaction was not interstate commerce.

The commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to
53 the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction, out of which grew the offense with which it stood charged, was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whiskey consigned to J. D. Main in Barbourville, Kentucky; but this does not constitute interstate commerce; unless there was a *bona fide* shipment to a real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce. In this case there was no *bona fide* shipment of merchandise from Cincinnati to Barbourville, but there was an illegal sending of whiskey into Knox county through the instrumentality of the express company for the purpose of finding a buyer there. In its very substance, the unknown consignor, whose headquarters is a lock box in the Cincinnati post office, simply appointed the Adams Express Company as his agent to find for him a purchaser in Knox county for a gallon of whiskey on a given commission. The defendant cannot say that it did not know the transaction was an illegitimate one, or that it believed it
54 was a *bona fide* shipment. It must show in defense of its otherwise illegal act in Knox county, that the State law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. Now, interstate commerce cannot be based upon fraud or chicanery; it must necessarily be a legitimate transaction. The constitution and statutes of the United States are not shields for criminals; nor do they furnish a means by which crime may be effectuated. The Supreme Court of the United States does not uphold criminal acts, or protect criminals from the consequence of their misdoings. The transaction which took place be-

tween Cincinnati and Barbourville bears the same resemblance to interstate commerce as the wares of the green-goodsman bears to the genuine money of the United States—both are mere counterfeits. As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce.

In the case of State *v.* Robinson, 49 Maine, 285, four baskets of champagne were seized under the laws of the State, and the question arose, whether or not, they being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said:

55 "It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct; and the exceptions must be overruled."

The case of Commonwealth *v.* Zelt, 139 Pa. St. Rep., 615, in principle involved the same question as the Maine case above cited. The court, on the question in hand, said:

"The fourth assignment is not sustained. The fact that defendant Porter was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the Commonwealth's case. This is substantially what the court below said to the jury."

Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and

56 that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, not that it honestly believed, but that it *was* the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant cannot shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent. In Am. & Eng. Encyc. of Law, vol. 12, p. 553, on this subject it is said:

"There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied."

56½ Cox, Hill & Thompson *v.* Columbus & Western Railway Co., 91 Ala., 392; James McNichol *v.* Pacific Express Co., 12 Mo. App. Rep., 401.

But passing this, while there is no direct evidence upon which one could lay his finger and say this showed knowledge, or that showed knowledge on the part of the express company, that the business in which it was engaged was a criminal one, we think, taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on, systematically, a criminal business, and that the names given as consignees to the various packages of whiskey shipped were fictitious. In other words, while there were real persons in Barbourville bearing the names used, these persons had no contract of purchase, but the whiskey was shipped in their names with a view of tempting them to purchase it after its arrival in Barbourville.

Let it be remembered that Barbourville is a small town, scarcely above the dignity of a village, although it is the county seat of Knox county. It is a matter of common knowledge, that in
57 a small town there are no secrets; every man knows every other man; what he does; how he conducts himself, and what are his habits. The system under consideration had been carried on a long time. Owens, the express agent, states that he has been at Barbourville fourteen years; that during that time shipments of whiskey have been received in the same way continuously. He admits that in no case did he ever notify any named consignee that there was a package for him. This tends to show that he expected the party to be notified in other ways. Large numbers of similar packages were held by him constantly. He rigorously enforced the rule not to deliver a package to any one except the consignee. This showed him to be a formalist, and that he knew the advantage of surrounding the transaction with every semblance of legality; to borrow one of Edmund Burke's fine phrases, the transaction was made "most iniquitously legal."

We do not believe it possible for an illegitimate business to be carried on through the express company on so large a scale, for so long a time, and especially where the remittances were to be made to a lock box, instead of to a named firm, without its being ascertained that the system was criminal. Viewing the whole
58 case, together with the large number of similar cases against the same defendant, involving the same facts, and which were all heard together, we are forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to conduct, and that the corporation itself was the accomplice, for pay, of the criminal consignors.

The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a large number of the cases involving violent crimes which come to this court on appeal from that section of the State are directly caused by the use of whiskey. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties

have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that
59 if, by the instrumentality of such transactions as we have under discussion, whiskey can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

The judgment is affirmed.

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court of Appeals before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in said suit between Adams Express Company, Appellant, and The Commonwealth of Kentucky, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty,
61 or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 25" day of June, in the year of our Lord one thousand nine hundred and six.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States, E. Ky. Dist.,
By J. W. MENZIES, *D. C.*

Allowed by—
J. P. HOBSON,
Chief Justice Kentucky Court of Appeals.

Filed Jun- 26 1906.

J. MORGAN CHINN, *Cl'k.*

62 Know all Men by these Presents, That we, Adams Express Company, as principal, and John D. Griffin, as sure*ties*, are held and firmly bound unto The Commonwealth of Kentucky, in the full and just sum of Five Hundred dollars, to be paid to the said The Commonwealth of Kentucky, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the State of Kentucky, in a suit depending in said Court, between Adams Express Company, Appellant, and The Commonwealth of Kentucky, Appellee, a judgment was rendered against the said Adams Express Company, and the said Appellant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Commonwealth of Kentucky, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Adams Express Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ADAMS EXPRESS COMPANY, [SEAL.]
LAWRENCE MAXWELL, JR. [SEAL.]
J. D. GRIFFIN. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
J. P. HOBSON,
Chief Justice Ky. Court of Appeals.

[Endorsed:] Filed Jun- 26 1906. J. Morgan Chinn, Cl'k.

63 Court of Appeals of Kentucky.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Knox County, No. 1841.

Appeal from Knox County, No. 1846.

Appeal from Knox County, No. 1861.

Appeal from Knox County, No. 1866.

Stipulation.

For the purpose of avoiding unnecessary writs of error from the Supreme Court of the United States, it is hereby stipulated and agreed between Adams Express Company and the Commonwealth, that the above entitled cases are substantially like the case of Adams Express Company, Appellant, *versus* Commonwealth of Kentucky, on appeal from Knox County, No. 1835, decided on the same day, towit: April 27, 1906; that a writ in said last mentioned case shall be sued out from the Supreme Court of the United States, and that the above entitled cases shall abide the decision of the Supreme Court of the United States in said case, and that the mandates of this court be stayed pending said decision of the Supreme Court of the United States, and that the same judgment shall be entered in these cases as shall be ordered by the Supreme Court of the United States in said case in which a writ of error is to be sued out, and that this stipulation shall be filed as part of the record in said case in the Supreme Court of the United States.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.
N. B. HAYS, *Attorney General.*

64 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

I, J. Morgan Chinn Clerk of the Court of Appeals of the Commonwealth of Kentucky, certify that the foregoing pages contain a full and complete copy of the record including the judgment and opinion of the court in the case of The Adams Express Company Appellant *v.* The Commonwealth of Kentucky Appellee, Appeal from the Knox Circuit Court, being case numbered 1835, as fully as same appears, from the records and files of my office.

And I further certify that there is hereto attached, the original Writ of Error from the Supreme Court of the United States, this day filed in this office, and also attached hereto a copy of the writ of error bond, as same appears from the original now on file in my office.

In testimony whereof, I have hereunto set my hand, and caused my official seal to be hereunto affixed.

Done at the Capitol at Frankfort, this the 26th day of June A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

65 Court of Appeals of Kentucky.

ADAMS EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Assignment of Errors.

Adams Express Company on the writ of error from the Supreme Court of the United States, assigns as error—

That the transaction on account of which it was prosecuted and has been convicted was interstate commerce, and was not subject to regulation by the state of Kentucky, and that the statutes of Kentucky under which it was convicted are in conflict with the commerce clause of the constitution of the United States, as applied to interstate shipments.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.

66 UNITED STATES OF AMERICA, *ss:*

To The Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Kentucky wherein Adams Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. P. Hobson Chief Justice of the Court of Appeals of Kentucky, this 22nd day of June, in the year of our Lord one thousand nine hundred and six.

J. P. HOBSON.

Service acknowledged.
J. C. W. BECKHAM,
Governor of Kentucky.
NAPOLEON B. HAYS,
Attorney General of Kentucky.

Endorsed on cover: File No. 20,297. Kentucky court of appeals. Term No. 332. Adams Express Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed June 29th, 1906. File No. 20,297.

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JAMES H. McKENNE
Cl.

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Supreme Court of the United States

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY. } No. 331

ADAMS EXPRESS COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY. } No. 332

AMERICAN EXPRESS COMPANY
vs.
COMMONWEALTH OF KENTUCKY. } No. 583

Motion to Advance.

N. B. HAYS.
Attorney General of Kentucky.

We consent to the granting of the foregoing motion to advance.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.

E. F. TRABUE,
Counsel for American Express Company.

Geo. A. Lewis Publishing House Print, Frankfort, Ky.

Supreme Court of the United States

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, Plaintiff in Error, v. COMMONWEALTH OF KENTUCKY.	No. 331
ADAMS EXPRESS COMPANY, Plaintiff in Error, v. COMMONWEALTH OF KENTUCKY.	No. 332
AMERICAN EXPRESS COMPANY. v. COMMONWEALTH OF KENTUCKY.	No. 583

MOTION TO ADVANCE.

The Commonwealth of Kentucky, defendant in error, moves the court to advance the above entitled cases on the docket and set the same down for hearing, as one case, at such early day during the present term as will be convenient to the court.

They are criminal cases. The plaintiffs in error are

express companies engaged in interstate commerce, and have been indicted and convicted for selling whisky in a local option district in Kentucky; and for delivering whisky and accepting the C. O. D. charges prohibited under statutes of Kentucky which they claim to be repugnant to the Constitution of the United States. The Court of Appeals of Kentucky held that the transactions were not interstate commerce.

There are now pending twenty-eight cases in the Court of Appeals of Kentucky involving substantially the same question which have been continued to the April term of that court, awaiting the decision of this court in the above entitled cases, and it is exceedingly important to the interests of the Commonwealth that the cases should be disposed of. If they are not advanced, the cases pending in the Court of Appeals of Kentucky may be decided and the docket of this court will be encumbered by many additional writs of error sued out by the express companies. There are also numerous indictments pending in the local courts of Kentucky involving the same question.

NAPOLEON B. HAYS,
Attorney General of Kentucky.

We consent to the granting of the foregoing motion to advance.

LAWRENCE MAXWELL, JR.,
Counsel for Adams Express Company.

EDMUND F. TRABUE,
Counsel for American Express Company.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 332.

ADAMS EXPRESS COMPANY, *Plaintiff in Error*,

vs.

THE COMMONWEALTH OF KENTUCKY.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case does not differ in any material respect from case No. 331, between the same parties, which is to be heard at the same time, and we therefore refer to our brief in that case.

Stripped of legal verbiage the indictment charged that the Adams Express Company, being engaged in the business of a carrier of goods by the method commonly known as express, carried for and delivered to J. D. Main, at Barbourville, Kentucky, a C. O. D. shipment of intoxicating liquor of less than five gallons, and collected the charges, "said shipment

and delivery being made and done at the time by said J. A. Owens, William Dedden and Adams Express Company in the usual course of business of said Adams Express Company." The indictment alleged that the place from which the shipment was made and the name of the owner of the liquor, "for whom the same was carried and delivered as aforesaid," were unknown to the grand jury, but it was stipulated at the trial that the place of shipment was Cincinnati, Ohio, and that the liquor was received and carried by the defendant in the usual course of its business as a common carrier (Rec. 3, 12, 14). The consignee, Main, testified that he had not ordered the liquor (Rec. 7), but there was no evidence that plaintiff in error or its agent knew that it had not been ordered.

These are all the material facts. The case was tried without a jury. The Adams Express Company was adjudged guilty and fined $60. The case was dismissed as to the agent. The bill of exceptions recites that it contains all the evidence (Rec. 5).

At the conclusion of the evidence the defendant moved the court to find that it was not guilty, on the ground that the transaction embraced in the indictment was interstate commerce. The court overruled the motion. (Rec. 15, 16.)

In rendering judgment the trial court said (Rec. 16):

"It was claimed by the company that it had no knowledge of the fact that there was no contract between the seller and the buyer; that it first received the knowledge of this fact on the trial of this case, and so far as the evidence shows this is true; still the court thinks that it should be bound in this case to know the facts that actually existed, and that it must be held to know the facts previously existing between the buyer and seller, if any; and even if the product delivered in this case was protected by interstate commerce, still when the company, as in this case, becomes the shipper and deliverer for a company that has no contract, the company then becomes a mere seller of liquor at the point of delivery.

To hold otherwise would be to allow this company through its office at Barbourville to become a common retail dealer of liquor in our midst, and thus violate the law, and make it an exception to the general rule, which prevents other persons and corporations from selling liquors in our midst."

The plaintiff in error filed its motion for a new trial assigning as grounds therefor that:

"The facts in evidence show that the shipment of the whiskey was received by the defendant as a common carrier in Cincinnati, Ohio, in the usual course of business, and delivered directly to the witness, J. D. Main, as a common carrier in the usual course of business in Barbourville, Kentucky, and was therefore covered by interstate commerce regulations." (Rec. 4, 5.)

On the overruling of the motion, the case was appealed to the court of appeals where the judgment was affirmed.

I.

The court of appeals decided that what defendant did as a common carrier was not interstate commerce, because there was no antecedent contract of sale between the shipper and the consignee, and that defendant's good faith was no excuse.

The court of appeals said that "the first and crucial question in this case" was "whether or not the shipment and delivery of the whiskey was an act of interstate commerce" (R. 21), and held that it was not, because there was no antecedent contract of sale between the shipper and the consignee (R. 22). The court said that no one could dispute "that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the law * * * the same as if he had brought the whiskey himself to Barbourville, and there sold it to Main. This being true the transaction

was not interstate commerce." (R. 22, 23.) The court then said (R. 23):

"The Commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction, out of which grew the offense with which it stood charged, was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whiskey consigned to J. D. Main in Barbourville, Kentucky; but this does not constitute interstate commerce; unless there is a bona fide shipment to a real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce."

The court said that in "very substance" the consignor "simply appointed the Adams Express Company as his agent to find for him a purchaser in Knox county for a gallon of whiskey on a given commission," and thought it immaterial that the defendant acted in good faith and without guilty knowledge, saying (R. 23):

"The defendant can not say that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county, that the State law did not apply

to it at that time, because what it did was in pursuance of an act of interstate commerce."

The court after saying again that "in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce," meaning thereby an antecedent contract of sale between the consignor and consignee, gave the following illustration to support its decision that the good faith of the defendant was immaterial (R. 24):

"Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, *not that it honestly believed*, but that it was the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and *that it believed* the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant can not shelter itself under its common-law duty devolving upon a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent."

II.

The animadversions of the court of appeals are not based on evidence, and are immaterial in view of the court's decision that the carrier's good faith and honest belief are no excuse.

The court having thus decided that an express company which transports whiskey C. O. D., in the regular course of business, from Ohio to Kentucky, is guilty of an offense under the statutes of Kentucky, unless it can prove affirmatively, that the consignee ordered the whiskey, and that it is not sufficient to show "that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment," and that the plaintiff in error was therefore properly convicted, said that it was "forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to conduct, and that the corporation itself was the accomplice, for pay, of the criminal consignors." (R. 25.)

The court conceded that there was "no direct evidence upon which one could lay his finger and say this showed knowledge or that showed knowledge on the part of the express company that the business in which it was engaged was a criminal one," but thought that "taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on systematically a criminal business, and that the names given as consignees to the various packages of whiskey shipped were fictitious" (R. 25). The court said that Barbourville was a small town, and that it was "a matter of common knowledge that in a small town there are no secrets. Every man knows every other man, what he does, how he conducts himself and what are his habits," and that "the system under consideration had been carried on a long time" (R. 25).

These observations of the court are immaterial so far as the federal question is concerned. The state court has decided that question by holding that the transaction in which the express company engaged was not interstate commerce, because there was no antecedent contract of sale between the shipper and the consignee, and that the defendant's ignorance and good faith are immaterial. But the observations are not justified by any evidence in the case.

There was no testimony that the defendant or its agent at Barbourville knew or had reason to believe that the consignee had not ordered the whiskey. He had received and paid for many similar C. O. D. packages during the preceding year, sometimes calling at the express office for them, and sometimes getting George Tie, a local expressman, to call for them and pay the charges (R. 9, 10, 11). There was no testimony that he ever informed the agent of the express company that he had not ordered the whiskey so delivered to him. Apparently he did order that which was received from J. D. Dantz, from whom, he says, he generally got his whiskey (R. 11). He regarded the product of the White Oak Distillery Company, from which he thinks the shipment at bar came, as "inferior whiskey," and is sure that he never ordered it (R. 10). He appears to have been in active correspondence with the concern. He testifies that he "notified them not to ship *in my name*" (R. 8), and that he got Jesse Tuggle "to notify them not to ship any more" (R. 9), and that he and Tom Wilson and Tom Gilbert "notified the parties not to ship any more *in my name*" (R. 9). But his scheme to get whiskey in a fictitious name failed. He admits that Owens, defendant's agent, told him that "he could only deliver boxes to the man to whom they were addressed" and that he never received a box from the express company, which was not addressed to him (R. 11).

The commonwealth stipulated at the trial that the

package on which the indictment was based "was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier" (R. 12, 3), and the trial judge in delivering his opinion, said that the evidence showed, and the fact was, that the defendant learned on the trial, for the first time, that the whiskey had not been ordered (R. 16). He gave judgment because he thought that the defendant "should be bound in this case to know the facts that actually existed, and must be held to know the facts previously existing between the buyer and the seller, if any" (R. 16).

The court of appeals said that the evidence showed that the express company "often had as many as fifty gallons of whiskey on hand at one time consigned to various parties under the same system" (R. 21), but there was no evidence that any of the whiskey referred to had not been ordered.

The court of appeals also said "that the remittances were to be made to a lock box instead of to a named firm" (R. 25). There was no evidence to that effect. The court probably had in mind the testimony of the consignee that in the box containing the whiskey he found envelopes addressed to a lock box at Cincinnati and order blanks (R. 6, 8). Apparently they were envelopes intended for the consignee's use to enable him to order more whiskey. So far as the express company was concerned, it returned the C. O. D. charges to the shipper in the company's C. O. D. wrapper (R. 13, 15).

III.

If what defendant did in executing a contract made in Ohio, in good faith and in the regular course of business, to carry whiskey C. O. D. to Kentucky, was interstate commerce, it is immaterial on what ground the state court denies the protection of the Constitution of the United States.

In this court it is immaterial, either on the question of its jurisdiction or on the merits, whether the decision of the court of appeals of Kentucky that the transaction was not interstate commerce, is reached by applying an erroneous rule of law, or by assuming facts not in evidence.

Nor is it material whether the conviction is sustained by the state court under the C. O. D. statute (sub section 4 of section 2557B), or under the general local option law (section 2557. In case No. 331, where the indictment was substantially the same, the court of appeals held that the conviction was under sub-section 4 of section 2557B, while in this case it held that the conviction was under the general local option law, and that the reference in the indictment to the C. O. D. law (sub-section 4 of section 2557B) was surplusage. If either statute is so applied by the state court as to regulate the business of interstate carriers, by requiring them to ascertain at their peril whether goods offered for transportation in another state have been contracted for by the consignee, it is repugnant to the constitution of the United States.

Sub-section 4 of section 2557B fixes no penalty. The fine imposed is provided for by the cognate section of the local option law, being section 2557, Kentucky Statutes, 1905, which reads as follows:

Section 2557: "After the entry of the certificate of the canvassing board as above provided for, in the order book of the county court, if the vote was given against the sale,

barter or loan of spirituous, vinous or malt liquors in the said county, city, town, district or precinct, as the case may be [There seems to be an omission here—Ed.] to any person, except as hereinafter provided; and any person who shall sell, barter or loan, directly or indirectly, any such liquors in said county, city, town, district or precinct shall upon conviction, be fined not less than sixty nor more than one hundred dollars, or be confined in the county jail for not less than ten nor more than forty days, or both so fined and imprisoned in the discretion of the court or jury for each offense; and any person who knowingly furnishes or rents a house, room, wagon or any conveyance or thing, in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than sixty nor more than one hundred dollars, and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same."

This section was referred to in the indictment. In case No. 331 the court of appeals considered that it had no bearing except as fixing the amount of fine (Rec. 28).

The other acts mentioned in the indictment are special acts forbidding the sale of liquor in Laurel and Knox counties.

We respectfully submit that the judgment should be reversed.

LAWRENCE MAXWELL, JR.,
JOSEPH S. GRAYDON,
Counsel for the plaintiff in error.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, Plaintiff in Error,
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Nos. 331 & 332

AMERICAN EXPRESS COMPANY, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY.
No. 583

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Additional Brief for the Plaintiffs in Error.

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PRINTED BY THE BARCLAY PRINTING CO., 1020 ELM ST., CINCINNATI, O.

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vs.
THE COMMONWEALTH OF KENTUCKY.
} No. 583

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Additional Brief for the Plaintiffs in Error.

I.

No question of fraud was submitted to the jury or passed upon by them.

In No. 331 the jury were instructed to find the defendant guilty if it delivered the whiskey to Meece and "received any pay whatever for its services in that behalf." Instruction No. 1, R. 24, 25. The court did not even qualify the instruction by saying that the absence of an order for the whiskey by the consignee, or the collection of the C.O.D. charges by the defendant, were material. The instruction

was absolute to convict if the defendant delivered the whiskey and received pay for its services.

In No. 583 the court charged the jury that "a delivery of said whiskey in Hodgensville C. O. D. was a sale, unless said whiskey had been ordered by said Graham [the consignee] previously of the consignor M. E. Stone" (Instruction No. 2, R. 15, 16), and the Court of Appeals said that in its "view of the law the instructions were proper." R. 31.

In No. 332, which was tried without a jury, the Commonwealth stipulated that the whiskey was received and delivered by the defendant "in the usual course of business as a common carrier" (R. 12), and the trial judge in delivering judgment said that, so far as the evidence showed, the defendant had no knowledge of the fact that there was no contract of sale between the shipper and the consignee until it was developed at the trial, R. 16. The Court of Appeals held that the defendant's good faith was immaterial, saying:

"The defendant can not say that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment," R. 23.

The court said that the defendant could escape conviction only by proving an antecedent contract of sale, and that the burden of such proof was on the defendant.

In both 331 and 332 the indictment alleged that the defendant was engaged in business as a carrier, that the shipment and delivery were in the usual course of such business, and that the whiskey was carried *for* and delivered to the consignee (p. 2 of each record).

II.

In Delamater vs. The State of South Dakota, decided March 11, 1907, this court held that "the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or

where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped." The decision was placed upon the ground that the business was carried on wholly within the borders of the state and that the statute did not burden any right secured by the Constitution, because there was no right under the Wilson act to sell whiskey in South Dakota. This ground of decision does not apply to a state statute which attempts to regulate a business which is carried on in two states, and embraces the transportation of an article of commerce from one to the other.

III.

The Wilson act does not authorize state regulation of the operations of the carrier at all, either in receiving the liquor in the state of origin, or in transporting it to the state of destination, or in delivering it there, for the state statute can come into play only after delivery, as the court has repeatedly held. The business of an interstate carrier can not be subjected at any stage to state regulation under the Wilson act. In Rhodes vs. Iowa, 170 U. S. 412, 415, Mr. Justice White referring to Bowman's case said:

"It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

And again at page 426:

"We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

A state statute can not therefore prohibit the payment of C.O.D. charges on an interstate shipment, for that act precedes or accompanies delivery, and takes place before the time arrives when the state legislation authorized by the Wilson act can come into play. The statute of Kentucky which forbids an interstate carrier to deliver a C. O. D. package and makes the carrier's reception of the C. O. D. charges an offense, is therefore not authorized by the Wilson act. Congress did not intend by that act to authorize the states to regulate the business or operations of an interstate carrier. That is a business which involves "interstate commerce in its fundamental aspect," and imports "in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states," to use the words of Mr. Justice White in Rhodes vs. Iowa, 170 U. S. at page 424.

At page 422 he says that the Wilson act "manifests no purpose to confer upon the states the power to give their statutes an extra territorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another state, the necessary effect must be to give to the laws of the several states extra territorial operation, for, as held in the Bowman case, the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the state for such shipments. If the construction claimed be upheld, it would be in the power of each state to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the state merchandise of the character named covered by the inhibitions of a state statute."

In Bowman vs. Chicago & Northwestern Railway Company, 125 U. S. 465, 486, Mr. Justice Matthews after quoting a passage from the opinion in County of Mobile vs. Kimball, 102 U. S. 691, in which Mr. Justice Field declared that

"there can be only one system of rules applicable alike to the whole country" for the regulation of commerce as defined by this court, and "that the authority which can act for the whole country can alone adopt such a system" and that "action upon it by separate states is not therefore permissible," said:

"The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the state of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other state into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defence a law of the state of Iowa, which forbids the delivery of such goods within that state. Has the law of Iowa any extra territorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter?" 125 U. S. 486.

IV.

C.O.D. means two things. In the first place it is a direction to the carrier not to deliver the goods unless the consignee pays certain money, and the carrier becomes liable to the shipper if it disobeys the direction. Can the State of Kentucky make it an offense for a carrier to receive and obey such direction given in Ohio with respect to an interstate shipment? In the second place a C.O.D. shipment involves a contract on the part of the carrier, for which it gets

compensation, to carry the money, if received from the consignee, back to the shipper. Can the State of Kentucky forbid an interstate carrier from making a contract in Ohio to carry lawful money of the United States from Kentucky to Ohio, and condemn the execution of that contract by the carrier as a criminal offense?

A large part of the commerce of the United States is carried C. O. D. By long established usage it has become a part of the business of express companies. Congress did not intend to place its regulation in the hands of the states. On the contrary it is placed under the control of the Interstate Commerce Commission.

In Crescent Liquor Company vs. Platt, 148 Fed. 894, Circuit Judge Goff granted an injunction to compel an express company to carry liquor C. O. D.

V.

Adams Express Company vs. Iowa, 196 U. S. 147, involved the following statutes of Iowa, which made it an offense to sell intoxicating liquor or to use a building for the purpose of selling intoxicating liquors therein. (Annotated Code of Iowa, 1897, Chap. 6, Tit. XII, p. 818, as amended April 6, 1900 Laws of Iowa, 28 G. A. 1900, p. 59.)

Sec. 2382. "No one by himself, clerk, servant, employee or agent shall, for himself, or any person else, directly or indirectly, or upon any pretense or by any device, manufacture, sell, exchange barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or em-

ployed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employee or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal, provided that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors from persons legally authorized to sell or dispense the same."

Sec. 2383. "Whoever is found guilty of violating any of the provisions of the preceding section, for the first offense shall pay a fine of not less than fifty nor more than one hundred dollars, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay upon conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars, and costs of prosecution, or be imprisoned in the county jail not to exceed six months."

Sec. 2384. "Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents are also declared a nuisance, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided."

The Adams Express Company was indicted and convicted in the state court for maintaining a nuisance, in violation of the foregoing section 2384. The indictment charged in substance that the Company, between July and December, 1900, at St. Charles, Madison county, Iowa, used a building for the purpose of selling intoxicating liquors therein, contrary to

law, and that it owned and kept therein intoxicating liquor with the intent unlawfully to sell the same within the state contrary to the statute.

The court charged the jury as follows, as appears at p. 6 of the record in this court (No. 82, October Term, 1904):

"You are further instructed that if you find from the evidence beyond a reasonable doubt that it [the defendant] received and kept at its office building in St. Charles, Madison county, Iowa, packages of intoxicating liquor, carried by it from other points as a common carrier, that said packages of liquor were marked C. O. D., and the price of said liquors marked thereon, and you further find from the evidence beyond a reasonable doubt, that the liquors so kept and held by it with intent to deliver same at said place to the party to whom it was consigned upon the payment and collection of the purchase price of the said intoxicating liquors, then and in that event, you are instructed that such delivery and collection of said purchase price of said intoxicating liquor would constitute a sale of said liquor at the place of its delivery and the collection of the purchase price thereof, and if you shall find from the evidence beyond a reasonable doubt, that intoxicating liquors were kept and held by the defendant at its office in St. Charles, Madison county, Iowa, for delivery at said place on the payment of the purchase price thereof, and that said acts were committed by the defendant within three years next prior to the 7th day of December, 1900, then the defendant is guilty of the crime of nuisance as charged in the indictment."

The Iowa statute was substantially the same as the Kentucky Statute (Sec. 2557), and the instruction of the Iowa court to the jury was substantially the same as the instructions of the Kentucky court in Nos. 331 and 583. In other words both courts held that an express company which delivered liquor C. O. D. was guilty of making a sale thereof at the place of delivery, and that is declared to be the effect of the transaction by section 2557B 4 of the Kentucky Statute. In reversing the judgment of the Iowa court this court

therefore necessarily held in effect that it could not be said that an express company which carried liquor C. O. D. into Iowa made a sale of it in that state in violation of the local law; and that is precisely what we ask the court to rule in the cases at bar.

The fact that the whiskey was not ordered by the consignees in the cases at bar is not material, for if the plaintiffs in error acted in good faith, and in the regular course of their business as common carriers, it can not be said of them here any more than in the Iowa cases that they were guilty of making unlawful sales of the liquor, since their only connection with the transaction was that of common carrier.

As matter of fact there was no evidence in the Iowa case against the Adams Express Company that the consignee had ordered the whiskey. It was stipulated, as appears at page 4 of the record in that case, that the goods "were shipped upon an order which had been sent to the consignor by a traveling agent for consignor," but there was no proof that the consignee had in fact given an order to the traveling agent, and in that respect the case was similar to No. 583, where there was an order the genuineness of which the consignee disputed.

The assumption of jurisdiction by this court in the Iowa cases, and its reversal of the convictions, necessarily involved the decision that what the express companies did in carrying liquor C. O. D. into that State was interstate commerce, and could not be justly denounced as the making of sales in violation of the local law. That is what we ask the court to say in the cases at bar.

In State vs. Cairns, 64 Kans. 782, Cairns, who was agent of the Wells, Fargo Express Company, was convicted of selling intoxicating liquors. The Supreme Court of Kansas reversed the conviction, stating the question before it thus:

"Is the agent of an express company or other common carrier for hire, who in good faith delivers goods carried by his principal, consigned C. O. D., and collects and returns the charges thereon, guilty of selling intoxicating liquors to the party to whom delivery is made, even though he knows the goods so consigned and delivered to be intoxicating liquors."

A similar decision of the Texas Criminal Court of Appeals is set out at length at pages 28 and 29 of our brief in No. 331.

Respectfully submitted,

LAWRENCE MAXWELL, JR.,

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Supreme Court of the United States

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 331.
COMMONWEALTH OF KY. - - - Defendant;
and
ADAMS EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 332.
COMMONWEALTH OF KY. - - - Defendant;
and
AMERICAN EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 583.
COMMONWEALTH OF KY. - - - Defendant.

Brief for Defendant in Error.

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Geo. A. Lewis Publishing House Print, Frankfort, Ky.

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AND

AMERICAN EXPRESS COMPANY, . . Plaintiff in Error.

v. Case No. 583.

COMMONWEALTH OF KY. . . . . Defendant.

BRIEF FOR THE DEFENDANT IN ERROR.

CASE NO. 331.

On February 17, 1904, Adams Express Company was indicted by the grand jury of Laurel county, Ky., for

the unlawful sale of liquor in violation of the local option laws of Kentucky. Motion to quash the summons was made and overruled. A demurrer was filed to the indictment and overruled.

On the trial the jury returned a verdict of guilty, and fixed the fine at sixty ($60.00) dollars, on which judgment was duly rendered. Plaintiff in error reserved exceptions, and filed its motion and grounds for a new trial, which was overruled. An appeal was duly prosecuted to the Supreme Court of the State, where, on June 17, 1905, the same was affirmed.

A petition was then filed in said court for a rehearing, and on May 4th, 1906, it was overruled. It is now here on writ of error for review.

SYNOPSIS.

From the evidence it appears that a gallon of whisky was shipped by an unknown consignor to the prosecuting witness, George Meece, to East Bernstadt, Laurel county, Ky.; that said Meece had not ordered it, nor authorized anyone to do so for him; that the first information he had of its being in the express office was given to him by the agent of said company; that he informed the agent that he could not take it out then, but said to the agent, "if you will hold it till next Saturday, I will then come and get it." The agent agreed to hold it, and Meece went the next Saturday and paid the C. O. D. charges, $3.85, and the agent delivered it to him. The agent knew the package contained whisky or brandy, and admits that he had been delivering quite a number of similar packages under like circumstances. The plaintiff in error claims that

its holding of said whisky, the acceptance of the C. O. D. charges, and delivery of the whisky constituted a part of the alleged interstate transportation.

CASE NO. 332.

The evidence in case No. 332 is substantially the same as in case No. 331, with the additional facts, that the plaintiff in error has been shipping on an average of 50 such packages daily to persons who did not order them, for the past 14 years; that the instruction of the plaintiff in error to its agents is to hold such a package for two or three days, and if the party to whom it is consigned does not call for it within such time, then to notify such person of there being a package in the office for him. If he does not call for it from 30 to 60 days thereafter, he must return such package to the unknown consignor. The agent admits, however, that he never notified the supposed consignees. Plaintiff in error contends that its holding, delivery and acceptance of the C. O. D. charges form part of its alleged interstate transportation.

CASE NO. 583.

EVIDENCE.

Richard Graham, the party to whom the whisky was shipped, states that he did not order the package of whisky, nor did he authorize any one else to do so for him; and that he did not make or sign, or authorize any one else to make or sign, his name to the alleged order offered in evidence for said whisky. He says that he did not know that the package contained whisky until

he had opened it; that he then gave the agent a drink of said whisky. He states that he received it at Hodgenville, Kentucky, and it is shown that the local option laws of the State were, and are, in force there. It is plain from the evidence that this order was a forgery, and was made by the agents of whisky men who go into these local option districts and there procure the names of all men whom they may tempt to buy their whisky, by shipping them a package C. O. D. to their local express office, and thereby, under the protection of the interstate commerce clause, they and their willing allies, the express companies of the State, evade the local option laws thereof. If the appellant did not know, or could not have known by the exercise of reasonable diligence, the local option laws of the State were, by this trick, fraud and deception, evaded, and it accepted the C. O. D. charges and delivered the package as a part of its interstate transportation, then it was not guilty.

The evidence was conflicting, and the court properly charged the jury that they should find the appellant in error not guilty, if they believed from the evidence that whisky had been shipped by appellant in error from Cincinnati, Ohio, and had been ordered by said Graham. But whether or not it had been ordered, or was shipped by appellant in error from Cincinnati, Ohio, and was, therefore, an interstate transaction, was a question of fact for the jury to find, and their finding is not subject to review.

The alleged order purports to have been made on March 21st, 1905. The whisky reached Hodgenville March 24th, and the agent mailed a notice to Graham

on March 27th, and it purports to have been delivered to Graham on March 29th, 1905. But Langley, the appellant's agent, swears that the book which he keeps, showing when such packages were received and delivered, shows that it was received at Hodgenville on April 17th, 1905, and delivered to Graham on April 18th. These facts, taken together, justify the conclusion that the whisky was shipped in March and held by the appellant in error until April 18th, before it was delivered to Graham.

We invite the court's attention to the facts in this case, as they must determine the guilt or innocence of the appellant. The Commonwealth contends that if the plaintiff in error held the said package and stored it in its warehouse, it did so as the agent of the whisky shipper, and especially when it had remained there longer than a reasonable time for its delivery to Graham, it ceased to be part of the interstate transportation, and under the Wilson law became a part of the mass of property in the State and subject to the police laws thereof. The facts in the two preceding cases and the discussion of the law applicable thereto have been gone over fully, and the same, we contend, applies to this case.

WILSON ACT—AUGUST 8, 1890.

United States Statutes 1901, page 3177.

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or *remaining therein for use, consumption, sale or storage therein,* shall, upon arrival in such State or Territory, be subject

> to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt by reason of having been introduced in original packages or otherwise."

This act has been before this court for its construction and interpretation in the following cases:

Wilkerson v. Rahrer, 140 U. S., 545 (35 : 572.)

Scott v. Donald, 165 U. S., 58 (41 : 632-8.)

Rhodes v. Iowa, 170 U. S., 412 (42 : 1088.)

Vance v. Vandercook Co., 170 U. S., 438 (42 : 1100.)

American and Adams Express Co. v. Iowa, 196 U. S., 133-147 (49 : 417-424.)

Foppiano v. Speed, 199 U. S., 501 (50 : 288.)

Heymann v. Southern R. R. Co., Oct. Term, 1906, Advance Sheets, January 15, 1907, page 105.

In the Rahrer case the Wilson act was held to be constitutional, and it was held that Congress had the power to provide that the articles of interstate commerce named in said act should become subject to State laws earlier than other articles of interstate commerce.

In the Scott case this court held that a State law of South Carolina was repugnant to the Constitution of the United States because it discriminated in favor of domestic and against foreign wines, &c.

The Court said:

> "It is sufficient for the present case to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other

States; that such legislation is void as a hinderance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

In the Rhodes case the box of whisky had been shipped from Dallas, Illinois, to Brighton, Iowa. On its arrival at Brighton it was placed by the trainmen on the station platform. Shortly afterwards Rhodes, the the agent, moved it from the platform into the freight house, a distance of about 6 feet. *In about an hour thereafter* the box was seized by a constable under a search warrant, on the ground it contained whisky. At the time of the seizure the freight charge due to the railroad was unpaid. Under the above facts the court said:

"We think that, interpreting the statute by the light of all its povisions, it was not intended to, and did not, cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

In the Vandercook Co. case this court held that a State law which undertook to regulate the constitutional right of a citizen of one State to contract with a citizen of another State for an article of commerce, and to have it shipped to him for his individual use, was repugnant to the Constitution, and void; but that since the adoption of the Wilson act the Vandercook Co. could not ship its wines from the State of California to its agent in South Carolina, and through him sell the same in original packages, or otherwise, as in-

terstate commerce when the same was prohibited by the laws of said State.

In the American Express Company's case four boxes of whisky were shipped C. O. D. by it from Rock Island, Ill., on March 29th, 1900, to Tama, Iowa. They reached Tama on March 31st, *and on that day were seized in the hands of the express agent.* The express company set up that it had received the packages, *not for sale in Iowa,* but for *carriage and delivery to the consignees.*

> "An agreed statement of facts was stipulated, admitting the receipt, carriage and the holding of the packages as above stated."

The court reaffirmed the Rhodes case, and said:

> "It was, however, decided that the Wilson act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

After referring to the cases of Caldwell v. North Carolina, 187 U. S., 622, and Norfolk & W. R. Co. v. Sims, 191 U. S., 441, as to when the title of such property passes as between consignor and consignee, the court continued:

> "The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the States to levy general and undiscriminating taxes on mer-

chandise shipped from one State into another may attach to such merchandise before sale in the original package, when the merchandise has become at rest within the State, and, therefore, enjoys the protection of its laws, and this upon the well-recognized distinction that the movement of merchandise from State to State, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution."

In the Adams Express Company case it was charged with maintaining a nuisance in violation of a section of the Code of Iowa, and for keeping intoxicating liquors with the intent unlawfully to sell them within the State, contrary to an Iowa statute. On a plea of not guilty by said company, the following stipulation was made:

"*An agreed statement of facts was stipulated from which it appears that the Adams Express Company was a common carrier, engaged in the express business between the States of Missouri and Iowa; that it received the liquor in question at St. Joseph, Missouri, to be carried to St. Charles, Iowa, there to be delivered to the consignees, whose names were upon the packages, and that each and all were marked C. O. D.—meaning that they were not to be delivered by the express company to the consignees until the purchase price and the express charges were paid to the agent of the express company. It was further recited in the statement of facts that the only connection of the Adams Express Company with the transaction or transactions in relation to said liquors was as a common carrier,* having received the same in Missouri for carriage to the consignees at St. Charles, Iowa."

This court, on the authority of the American Express Company case, held the conviction erroneous.

In the Foppiano case the plaintiff in error was plying the ferryboat, Chas. H. Organ, between Memphis, Tenn., and a point in Arkansas, and while so doing operated a bar at which he sold liquors without having procured license as required under the laws of Tennessee. He contended that he was not required to take out license, first, because he was engaged in interstate commerce; and, second, because the ferry company being an Arkansas corporation, he was within the jurisdiction of that State when he was on the boat and sold the whisky.

The court said:

> "When the ferryboat entered the boundaries of the State of Tennessee, and fastened up at the wharf in Memphis, and the plaintiff in error then sold liquors to customers as they asked for them, he became subject to the police laws of that State regarding the sale of intoxicating liquors."

In the case of Heymann v. Southern R. Co., decided at the October Term, 1906, Advance Sheets January 15, 1907, page 104, the court, after reviewing all these cases and reaffirming the construction it had placed on the Wilson act, *stated the facts which differentiate the cases at bar from any case which it has decided.* Here the court said:

> "Of course, we are not called upon in this case, and do not decide, *if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them,* ARE DESIGNEDLY LEFT IN THE HANDS OF THE CARRIER FOR

AN UNREASONABLE TIME, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, *the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered.* We say we are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition."

INTERSTATE COMMERCE.

The construction of article 1, section 8, sub-section 3 of the Federal Constitution by this court may be summarily stated:

First. The transportation of articles of commerce from one State to another is interstate commerce.

Second. That, in the absence of legislation by Congress, interstate commerce among the States shall be absolutely free from, and untrammelled by, State interference.

Third. That articles of commerce, other than whisky, shipped from one State into another in original packages remain, under the protection of the interstate commerce clause of the Federal Constitution and free from State regulation for such reasonable time as may, in the usual course of business, be required for delivery to and sale by the consignee.

Fourth. That any original package of whisky shipped from one State into another State, since the passage of the Wilson act, remains under the protection of the interstate commerce clause of the Federal Constitution and free from State regulation, for such time as may be reasonably necessary in the usual course of business for it to be delivered to the consignee.

Fifth. It is also conceded by the Commonwealth that, when a consignment of interstate commerce has been made from one State into another State, that, after it has reached its destination and come to rest, it is still under the protection of the interstate commerce clause for such reasonable time as may be necessary for the consignee to receive it, whether shipped in original packages or otherwise; but that it thereafter becomes subject to the jurisdiction of the laws of the State, and must be considered as mingled with the property of such State.

Sixth. That an interstate commerce transaction is protected from State interference, not only by the principle of freedom of commerce between the States, but by the inherent right of a citizen of one State to freely contract with a citizen of another State for an article of commerce, and to have it delivered to him as a part of said interstate transaction without State interference.

Seventh. The right to ship articles of commerce from one State into another, and there sell the same, while in the original packages, without State interference, is well settled; but this right does not apply to whisky as an article of interstate commerce. The Wilson act so regulated it as an article of interstate commerce as to make it on its arrival in a State become subject to the laws of such State, whether introduced in original packages or otherwise. **If after it has arrived within any State it remains therein for use, consumption, sale or storage, it becomes subject to the operation of the laws of such State, enacted in the exercise of the police powers.** The Commonwealth contends that the evidence in the

cases at bar shows that said packages had arrived within the State before the C. O. D. charges were accepted or the deliveries by the plaintiffs in error were made; and **that plaintiff held the same for sale, and had the same stored, within the meaning of the Wilson act,** and that plaintiff did so as the agent of the consignors or whisky dealers who shipped the same; and that appellant knew, or could have known by the exercise of reasonable diligence, that said shipments were frauds, deceptions and tricks to evade the local option laws of Kentucky.

But this case does not come within any of these concessions. The shipment of whisky was sent to the consignee without an order or request for it by him. No contract, expressed or implied, existed between the consignor and consignee for said shipment. There was no interstate commerce transaction between them. The consignee did not know who was the consignor, or from where it was shipped.

In this case the prosecuting witness, George Meece, was asked (R., 11) following question:

"28. How did you find out that whisky was there?"

"A. The first I knowed it was there, I went in with my brother, and he asked if there was a package there for him, and while looking over the books, Newland (agent of appellant) said there was one there for George Meece. I told him I couldn't take it then, but would take it next Saturday, which I did."

This is the only contract Meece had with any one for

the whisky. It was between the agent of plaintiff in error and said Meece, and not between Meece and the owner or consignor of the whisky. This whisky was the property of the consignor's, and the plaintiff in error held it as his agent. When the plaintiff in error agreed with Meece to hold the whisky for the ensuing week and until he could take it, and did hold it for him and at the end of said time accepted the pay and delivered him the whisky, it was certainly a sale of the whisky at East Bernstadt, under the local option laws of Kentucky, and not elsewhere.

After this agreement was made the plaintiff in error held it as a warehouseman, and if it ever had the semblance of an interstate commerce package, it then ceased to be such. This agreement between the plaintiff in error and Meece was a constructive delivery of said whisky to said Meece; and it had fully arrived in said State within the meaning of the Wilson act, and during the time plaintiff in error held it it was stored for sale within the meaning of said act. Hence on these undisputed facts the trial court did not err in refusing to instruct the jury as to an article of interstate commerce.

On April 28, 1890, the case of Leisy v. Hardin, 135 U. S., 100 (34 : 129), was decided. It was held in the opinion of the court that the right of transportation of an article of commerce from one State to another *included the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.* This enabled the whisky men, through the channel of interstate commerce, to evade the local option laws of Iowa.

On August 8, 1890, Congress passed the Wilson act,

and in the case of Rhodes v. Iowa, 170 U. S., 412 (42 : 1089), the court, in speaking of its purpose, said:

> "On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which was its purpose to frustrate."

The appellant was indicted and convicted, not for the transportation of an article of commerce, either State or interstate, but for the unlawful sale of whisky in a local option district.

The transportation of whisky from a point without to a point within Kentucky, where the local option law is in force; or from one point within the State where the sale is permitted to another point therein where the sale is prohibited, is no offense under the local option laws of Kentucky.

James v. Commonwealth, 102 Ky., 108.

Doores v. Commonwealth, 28 Ky. L. R., 192.

McDermott v. Commonwealth, 29 Ky. Law Rep., 750.

Adams Express Co. v. Commonwealth, 29 Ky. Law Rep., 904. = Crigler S. Com. 27 Ky. Law Rep. 918.

It is the payment of the money, or the delivery of a C. O. D. package of whisky shipped from a point within the State where the sale is permitted, to another point therein where the sale is prohibited; or the payment of the money for an interstate commerce C. O. D. package, at a point within the State where the sale is prohibited, which constitutes the offense embraced by sub-section 4 of section 2557b, Kentucky Statutes.

Newland was the express agent. He testified in part as follows: (R., 13 and 14.)

"19. How many such packages had you seen there in the depot prior to the date on which you delivered to George Meece the package he got?"

"A. I don't know."

"20. Well, about how many?"

"A. About seventy-five, or something like that."

"21. Did you ever see any of these packages taken out of the depot office and opened?"

"A. I have seen packages like that after they were opened. I never saw them opened."

"22. What was in *them* packages, like the one you delivered to George Meece, that you say you saw after it had been opened?"

"A. Four quart bottles."

"23. What was contained in these bottles?"

"A. I don't know."

"24. Was there anything in them?"

"A. Yes, there was something in them."

"25. Were these bottles labeled?"

"A. Yes, sir."

"26. What was on the label?"

"A. Some were labeled 'whisky,' and some 'brandy.'"

"32. Is it not a fact that you were aware, or at least fully satisfied, that these packages of which you speak of having been shipped there to that office, prior to the date on which you delivered that shipment to Mr. Meece, contained whisky or brandy?"

"A. I was satisfied that was what they contained."

"33. Wasn't you fully satisfied, also, that the shipment you delivered to George Meece was a package of whisky or brandy?"

"A. I thought it was; yes, sir."

(R., 19.)

"66. When did you receive that package at East Bernstadt?"

"A. I could not say the date, so many of them come. It might have been in November or December. I think I delivered it in December."

"67. You delivered it, you say, in December?"

"A. I think it was."

"68. How much did you collect on that package?"

"A. Three dollars and eighty-five cents."

"69. Did you pay any of that money to the Adams Express Company?"

"A. No, sir."

"70. I will ask you if it is not a fact that every cent that you received from Mr. Meece on that package was put up in a sealed envelope and sent to Crigler & Crigler, Cincinnati, Ohio?"

"A, Yes, sir, it was."

"73. I will ask you if it is not a fact that before this package was received by the Adams Express Company, that the charges for transporting same were paid to the Adams Express Company in Cincinnati, Ohio, for the transportation of this package from Crigler & Crigler to deliver it to East Bernstadt, to George Meece?"

"A. Yes, sir, it was prepaid."

(R., 21.)

"92. About what was the express charges on the express package which Mr. Meece received at East Bernstadt?"

"A. Not any charges on it there, it was prepaid. It was about fifty-cents, I think."

95. Do you know who prepaid the charges on that particular package?"

"A. The shipper, I suppose."

"96. Does the Adams Express Company keep a record of the charges on express packages?"

"A. Yes, sir."

"97. Did you keep one for the company in East

Bernstadt, and did you do so at the time this shipment was delivered to Mr. Meece?"

"A. Yes, sir."

In the case of Missouri, Kansas and Texas Railway Company v. Hober, 169 U. S., 613 (42 : 878,) it is held that U. S. Revised Statute, section 5258, which authorizes railroads to carry freight and property from one State to another, does not authorize them to carry into a State, in violation of State law, cattle known, or which by due diligence may be known, to be in such condition as to impart disease to the domestic cattle of such State. Here the court said:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * *
>
> "The States might, by police regulations, protect their people against the introduction, within their respective limits, of infected merchandise, and by like regulations exclude from their midst not only convicts, paupers, idiots, lunatics and persons likely to become a public charge, but animals having contagious diseases." * * * And "a statute prescribing a rule of civil conduct, that a person or corporation bringing into the State cattle that are known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes."

The court here instructed the jury that before they could find the defendant railroad company guilty, "they must believe that the officers, employes or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this State (Kansas) were liable to impart such disease to the native cattle of this State (Kansas), or that they ought, by the exercise of diligence and care, to have known of the dangerous character of these cattle, and that they would, or were liable to, impart such disease to the native cattle of this State (Kansas)."

This instruction was approved.

In case No. 331 at bar, the express agent not only, by the exercise of diligence and care, could have known that these packages contained liquor, which was prohibited to be sold in said district, but he positively states that he had seen a number of like packages opened, and that they contained four quarts of whisky or brandy, and that at the time he agreed with Meece to hold it until Saturday, and at the time he delivered it to him, he believed that said package contained whisky or brandy. Hence, under the above authority, the plaintiff in error should be held liable for knowningly holding and delivering said liquor, and accepting the charges therefor, which constitutes a sale under the laws of Kentucky.

CASE NO. 332—OCTOBER TERM, 1906.

From the evidence in this case it appears that the plaintiff in error had, within twelve months before the finding of the indictment, both delivered and accepted the C. O. D. charges on some 20 packages of whisky from the

prosecuting witness, J. D. Main; that he had not ordered any of them directly or indirectly; nor had he requested, directly or indirectly, the plaintiff in error to transport them for him. The plaintiff in error had returned some packages which Main had refused to take out of its office. There was no contract of consignment. Hence no interstate commerce transaction existed as between a consignor and consignee.

The evidence further shows that, notwithstanding the local option law was in force at Barbourville, the agent, Owens, usually has 50 of these packages stored in the express office for consignees who have never ordered them; that the appellant's instruction to its agent is to give such consignee notice, if the package is not called for in two or three days; and if not called for from 30 to 60 days, then to return it to the consignor; that this custom has been carried on by appellant for 14 years, and is still being kept up. The agent says he never notifies the consignee, and assigns as a reason that such packages come so fast and in such numbers that he has not time to do so.

J. D. Main in part testified as follows:

"Q. From what parties did you get the whisky?"

"A. I think the brand of the whisky was called the White Oak, and there were envelopes in the box giving the number of a lock box at Cincinnati; they came there addressed to me, with $3.85 charges."

"Q. That was the C. O. D. charges?"

"A. Yes, sir."

"Q. You paid that to the agent at the Barbourlivle depot?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you order the whisky?"

"A. No, sir."

"Q. Did you know it was going to be shipped to you?"

"A. I did not."

"Q. Did you authorize any company to ship the whisky there to you?"

"A. Did not."

"Q. Did the Adams Express Company have any authority from you, in any way, to bring the whisky there?"

"A. No, did not."

* * * * * * * * * * *

"Q. Where did you get the packages; from what part of the depot?"

"A. There was a private room in the express office in the depot."

"Q. Got it out of the express office?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you have any talk with Mr. Owens about it?"

"A. Yes, sir."

"Q. What did you say about it?"

"A. The only conversation I remember was that he would not deliver the whisky to any party that it was not addressed to. I did not know who shipped the whisky."

"Q. At the time you got this package out of the depot and turned the money over to Mr. Owens, were there any other packages of whisky there in the express office?"

"A. Yes, sir."

"Q. How many did you see?"

"A. I saw a good many stacked up there."

* * * * * * * * * * *

"Q. Do you know from where the whisky was shipped except what you have stated?"

"A. [illegible]g, only what I have stated. I don't know anything about where it was shipped from."

"Q. Did you get any information from Mr. Owens as to how the packages came into the depot?"

"A. He said they came by express, and the express charges must be paid."

"Q. Was there anything on the bottle, any brand or anything on the bottle, by which you could tell from where the bottles came?"

"A. I don't remember exactly how the bottles read; there came different boxes and different brands, but it seems to me like it was the White Oak Distillery Co., Covington, Kentucky."

* * * * * * * * * * *

"Q. Did you ever order any boxes of whisky from those people?"

"A. I did not."

"Q. Did you ever authorize any one to do it?"

"A. I did not."

"19 Q. How did you get information that the whisky was there?"

"A. Very often I would send by some one to know if it was there, and then I would go and get it. I notified them once, and also got Mr. Jesse Tuggle to notify them not to ship any more."

"Q. After you found out the whisky was there, on various occasions you would go and take it out?"

"A. Yes, and pay for it. Me and Tom Wilson and Tom Gilbert notified the parties not to ship any more in my name."

"Q. Did you ever refuse a box of whisky that was shipped to you?"

"A. I don't know how many was shipped to me; I have taken out several boxes."

"Q. About how many did you take out?"

"A. I don't know; I may have paid out twenty boxes. I don't remember how many, in the latter part of the year 1904 and the earlier part of the year 1905."

* * * * * * * * * * *

"Q. You paid him ten cents for delivering packages from the depot?"

"A. Yes; $3.85 was what I paid at the depot, and $3.95 is what I paid him."

"Q. Do you mean to say that you were buying this from the drayman?"

"A. No, sir."

"Q. You mean to say you were buying it from the agent?"

"A. No, sir."

"Q. What do you mean?"

"A. I mean that I paid the required charges as shown on the boxes."

* * * * * * * * * *

"Q. Did you ever order a box returned?"

"A. I notified the company not to ship any more to me."

"Q. Did you ever order the agent there to return a box that was shipped to you?"

"A. It seems like I have, probably two years ago."

"Q. Have you in the last six months?"

"A. No, I think not."

"Q. In the last twelve months?"

"A. I will not be positive about that; I know that I never ordered the boxes from either of those companies; it is inferior whisky."

* * * * * * * * * *

(Judge.) "You have some theory about how this whisky came to be sent you?"

"A. I have not the least idea. I have heard that there was some fellows around here, especially one of the Wests, who would get these names and send them in there. Charley Tinsley told me that this fellow got $86.00 on boxes he had sent here."

"Q. What West is that?"

"A. Some call him Charley Atkins, and some West; that is the way I understood the whisky was

shipped here by some fellow sending off the names; all I know about that is that I have heard it."

* * * * * * * * * * *

J. A. Owens testified as follows:

"Q. When was the first knowledge received by you that a C. O. D. package was in the care and custody of the Adams Express Company to be delivered to him?"

"A. When the box was put off of the train at Barbourville."

"Q. Did you notify Mr. Main of the receipt of that package?"

"A. I don't believe I have; I don't believe I ever notified him."

"Q. What is your custom with reference to notifying people about packages?"

"A. It is the rule of the company to notify the people in two or three days."

"Q. Do you always do that?"

"A. Not always; the business is so heavy I have not time generally."

"Q. Did Mr. Main come and receive these paskages?"

"A. Yes; he received some himself, and some were sent down town to him."

"Q. How many packages did Mr. Main receive?"

"A. I don't know."

"Q. About how many?"

"A. I don't know; I suppose he got ten or fifteen boxes."

"Q. Did you ever deliver to Mr. Main any whisky which was not shipped to him?"

"A. No, I did not."

"Q. Where was this whisky which you delivered to him billed from?"

"A. Cincinnati."

"Q. Do you know from whom that whisky was received?"

"A. No, I do not; only from the C. O. D. labels."

"29 Q. Now explain to the court how that whisky was billed, what information you received from the weigh bill, from whom it is received, and to whom the money goes?"

"A. The boxes come in with the express weight bill telling what amount was to be paid, from Cincinnati, Ohio, to Barbourville, Kentucky, and with that is the C. O. D. wrapper which the money goes back in; the wrapper in which we return the money after the package is delivered goes to the distillery, or the agent for the distillery."

* * * * * * * * * * *

"Q. You don't know where the whisky was manufactured, or where it was shipped from, except from the C. O. D. packages by which you returned?"

"A. I know the whisky was shipped from Cincinnati to me, and that is where I returned the money."

"Q. You don't know whether it was manufactured in Covington or some point in Kentucky and sent to Cincinnati and shipped back in this State?"

"A. No, sir."

* * * * * * * * * * *

"Q. You don't know how they happened to be sending the whisky to him without an order?"

"A. No, I do not."

"Q. About how many packages such as you delivered to him did you have in the depot at any one time during the year next before the December term of this court, 1904?"

"A. We had several; as high as fifty at a time."

"Q. How long has this whisky package business been carried on by the Adams Express Company through the depot here at Barbourville?"

"A. As long as I have lived here—14 years."

"Q. Is it yet being carried on by the company?"

"A. Yes, sir."

"Q. To how many different parties would there be packages of this whisky in the depot at one time?"

"A. There would be quite a number sometimes."

"Q. I understood you to say that you did not notify the parties of the package being there?"

"A. I don't remember notifying them of the whisky packages; they come in so fast I cannot notify them."

"Q. Such an extensive business?"

"A. Yes, sir."

(Judge.) "Is this delivery still going on?"

"A. Yes, sir."

"Q. Still coming in?"

"A. Yes, sir."

"Q. About how many C. O. D. packages are there in the depot at this time similar to what Mr. Main speaks of?"

"A. Ten or twelve, I believe."

* * * * * * * * * * *

"Q. Have you not been delivering this whisky regularly for the 14 years that you have been there?"

"A. Yes, sir."

"Q. It has been going on from day to day and week to week?"

"A. Yes, sir."

"Q. And in quantities less than five gallons?"

"A. Yes, sometimes."

"Q. Mostly in gallon boxes, such as Mr. Main speaks of?"

"A. Yes, sir."

"Q. The express company's agent receives the money and returns it to the shipper?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you ever return any packages addressed to J. D. Main?"

"A. I believe I have."

"Q. Since when?"

"A. I returned some a week or so ago, a package that remains on hand thirty days we return them."

* * * * * * * * * *

The Commonwealth contends that, from these facts, the plaintiff in error knew that this whisky had not been ordered; that it knowingly acted as the agent of the lock-box consignor in holding these packages for 30 and 60 days, and then in returning such as were not called for; it acted as the agent of such consignor in the delivery and acceptance of the C. O. D. packages, and that it is subject to the same liability which such consignor would have been, if he had in person brought these packages from Ohio into the local option districts of Kentucky, and then sold them.

The case of Vance v. W. A. Vandercook Co., 170 U. S., 440 (42 : 1101), is in point.

The defendant in error had shipped its wines in original packages to its agent in South Carolina, to store and warehouse in said State, and then sell in the original packages as transported; and had also shipped its wine to individuals who had ordered it for their own use. In passing on the questions raised and construing the law of South Carolina, the court in reversing in part and affirming in part the opinion of the lower court, said:

> "It follows from the foregoing that the decree below rendered was well founded in so far as it restrained the defendants from seizing the property shipped into the State of South Carolina from the

State of California by the complainant for the residents of the State of South Carolina on the orders of such residents for their own use, because said shipments had not been made in compliance with the regulations of the law of South Carolina. *But it further follows that the decree below was wrong in so far as it restrained the State officers from levying upon the property of the complainant shipped into the State to agents of complainant for the purpose of being stored and sold therein in original packages, and from interfering with such sales.*"

Foppiano v. Speed, 199 U. S., 501 (50 : 288), to the same effect.

The rule that the plaintiff in error was the agent of the supposed consignee will not apply, because the plaintiff in error admits that it returned these packages if not called for at the end of 60 days. Now, this shows that the plaintiff in error and this lock-box consignor had some sort of an arrangement by which it was to hold them; and if not accepted and taken out by the consignee, then to return to the consignor. Hence it knew that these packages had not been sold, and that it was to store and warehouse them for sale for said consignor within the meaning of the Wilson act, and when it thereafter delivered or accepted the C. O. D. charges it violated the prohibition law of Kentucky.

CONSTRUCTIVELY DELIVERED.

It is the contention of the State that, when in case No. 331, the agent of plaintiff in error notified the supposed consignee, Meece, that this package which the agent knew was a package of whisky was there for him, and said agent and Meece then made the agreement whereby the plaintiff in error was to hold it till the next Saturday,

and did hold it, said packages was then constructively delivered to said Meece, and it was then stored for sale by the plaintiff in error within the meaning of the Wilson act; and after the package in case No. 332 had reached destination and been placed in warehouse of plaintiff in error under the instruction to its agent to hold same for 30 or 60 days, and if not sooner called for and accepted, then to be returned to consignor, it was then stored for sale within the meaning of said Wilson act; and the transportation of said packages had ceased to be an act of interstate commerce, and both were exempt from the protection of the interstate commerce clause.

In the case of Heymann v. Southern R. R. Co., decided at the present term, Advance Sheets No. 4, page 107, after reviewing the decisions that have construed the Wilson act, and especially the meaning of the word "arrival," the court said:

> "Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered."

When nothing remains to be done by the carrier to complete its contract of transportation but to deliver the goods to the owner or consignee, then after a reasonable time to remove the goods in the usual course of business has expired, the goods are constructively delivered

and the transportation is ended, and the transportation having ended, they cease to be under the protection of interstate commerce. If the carrier still holds them, it is as a warehouseman.

Gregg v. Illinois Central Railroad Co., 37 Am. St. Rep., 238.

THE PLACE OF DELIVERY.

When no designated place of delivery is shown, then the carrier's office, or the station where the transportation reaches its destination, is the place of delivery.

Gregg v. Illinois Central Railroad Co., 37 Am. St. Rep., 238.

Marshall v. American Express Co., 73 Am. Dec., 386.

Cavallaro v. Texas, et al., Ry. Co., 52 Am. St. Rep., 94.

Bullard v. American Express Co., 61 Am. St. Rep., 358.

Hutchinson on Carriers, section 379, &c.

When a consignor ships by express, he undertakes as part of his contract that there will be a consignee at the proper place and at the proper time to receive the consignment; and in default thereof the express company undertakes to notify the consignee, or if the consignee refuses to accept and pay for such consignment as in case No. 331, said company will notify the consignor. The course of business in the cases at bar shows that it was not required by its contract of transportation to deliver said packages, but it instructed its agents, if the packages were not called for in two or three days, to notify the supposed consignee, and if he did not then call for them, to still hold them from 30 to 60 days; and if he had not called for them, to return them to the consignor. This

shows an arrangement between the plaintiff in error and the consignor which is unusual, and that the plaintiff in error was acting as the agent of the consignor, and that it considered the consignor the owner of said packages.

Marshall v. American Express Company, 73 Am. Dec., 381.

American Express Company v. Hockett, 95 Am. Dec., 691.

The Southern Express Company v. Dixon, 94 U. S., 549 (24 : 285).

In the last case cited the court said:

> **"We think the rule is that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated."**

PLAINTIFF IN ERROR HELD SAID PACKAGE AS A WAREHOUSEMAN.

After the agreement by Newland, agent of plaintiff in error with Meece that he would hold said package in case No. 331, until the following Saturday to enable him to take it out, said package was stored for sale within the meaning of the Wilson act; and after package in case No. 332 had reached its destination, and a reasonable time had expired in the usual course of business for its delivery, and it was still held by the appellant, it then ceased to be a package of interstate commerce, if it was ever such, and the appellant held it as a warehouseman.

Hutchinson on Carriers, 2d edition, section 356:

> "It, therefore, frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a mere bailment. It may be stated as a general proposition that when the carrier has done all that the law requires of him towards accomplishing a delivery, and from any cause fails to effect it, and the goods are of necessity continued in his possession, he from that time becomes responsible only as a depositary. * * *
>
> "§ 376. *What is Reasonable Time for Removal*— What length of time will be considered reasonable for the removal of the goods, at the expiration of which the carrier will be regarded as holding them as warehouseman, when such reasonable time is allowed the consignee, it is said, can not be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case. When the facts are agreed upon or undisputed, it becomes a question to be determined by the court as one of law; but where they are disputed and unsettled, the question must be submitted to a jury."

The facts that this package, after Meece was notified it was in the express office, was by agreement stored and held for him by the plaintiff in error, are not disputed. Whether or not plaintiff in error was holding it as carrier or warehouseman when it was delivered was a question to be determined by the court as one of law.

> "§ 383. It has been frequently determined that if the express carrier tender the goods to the consignee, and they are refused, the carrier will from that time hold them in the character of warehouseman. * * *
>
> "§ 385. But it has been held that if the carrier is

instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for and take them within a few days, and requests the carrier to keep them for him until he is ready to pay for them, the carrier becomes a warehouseman of the goods; and if they are destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor."

The time when an article of interstate commerce shipped into a State ceases to be such may differ in some instances, but all will agree that there comes a time when it ceases to be such and becomes subject to the jurisdiction of State laws. The question then arises, how long can a common carrier hold packages of whisky which are shipped into a prohibited territory before such packages are subject to the laws of the State? Since the Wilson act, it becomes mingled in the common mass of property of the State as soon as it arrives within the State. Then when does it arrive within the State and become stripped of the protection of interstate commerce? It is the contention of the Commonwealth that when such packages have reached their destination and there has been reasonable time for the delivery thereof in the usual course of business, it then becomes a part of the mass of the property of the State, and subject to its laws.

Wald & Co. v. Louisville, Evansville & St. Louis R. Co., 92 Ky., 645.

Ray on Negligence of Imposed Duties (Freight Carriers), page 981:

"Although the liability of a transportation company as an insurer ceases upon arrival of the freight

at the depot, it becomes responsible thenceforward under its contract as warehouseman for a want of proper care in the delivery of the freight.

"A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he can not be protected as a carrier. In State v. Creeden, 7 L. R. A., 298, 78 Iowa, 556, the shipment of liquor had been received at the place of destination from six to fifteen days prior to the seizure, and was kept in the railroad freight house, or warehouse, used for storing freight transported or for transportation upon the railroad. It was said it is a familiar rule of the law that upon the arrival of freight at the place of destination, and its deposit in the carrier's warehouse, his responsibility as carrier ceases. He becomes, as to the freight and the consignor and consignee, a warehouseman."

In the case of Iowa v. Creeden, 78 Iowa, 556, the court said:

"A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he can not be protected as a carrier." * * *

The evidence in this case shows that the plaintiff in

error had constructively delivered this package to Meece; that it did not hold it as a common carrier; that it had been stored in its warehouse by agreement between it and Meece to enable him to get the money to take it out; that the plaintiff in error having ceased to sustain the relation of common carrier to said whisky, it was not protected by the regulations of interstate commerce when it delivered it, or accepted the pay therefor; that the acceptance of the C. O. D. charges was not a part of the interstate transportation of it; and said act constituted an offense within itself; and the same applies to package in case 332.

In the case of Emert v. Missouri, 156 U. S., 296 (39 : 430), involving the validity of a statute of Missouri prohibiting peddlers from selling goods before they should take out license to do so, the statute was held not to violate the commerce clause of the Constitution of the United States because it made no discrimination between residents or products of the State and those of other States.

Here it was the privilege of selling in a peculiar way which was prohibited without a license; and it was then decided that the law applied to a person selling articles manufactured in another State as well as to articles manufactured in Missouri. So if the local option C. O. D. statute applies to whisky shipped into Kentucky as well as to whisky shipped from one place in the State to another, still the State may prohibit the privilege of selling C. O. D. packages without in the least interfering with or regulating interstate commerce. It is the manner of sale, rather than the right to sell, which is prohibited by the statute.

The State court's construction of this statute is not subject to review unless that construction presents a Federal question. The State court says that the statute in question was not intended to apply, and does not apply, to interstate commerce.

In the case of Rippey v. Texas, 193 U. S., 502 (48 : 767), this court was dealing with the power of the State to control by legislation the sale of whisky, and said:

> "It is a question of the power of the State as a whole. But the State has power to prohibit the sale of intoxicating liquors altogether, if it see fit, and that being so, it has power to prohibit it conditionally. * * * *The State has absolute power over the subject.*"

If the State has absolute power over the subject, then it has the power to provide that the acceptance by an express company of the pay for a C. O. D. package of whisky, which is known to be such, whether interstate commerce or intrastate commerce, shall constitute a sale at the place where the whisky is paid for. Although the provision of the State law prohibiting such companies from receiving the pay for such packages may be said to incidentally affect interstate commerce, it is no attempt to regulate it to say to such companies, you shall not constitute yourselves the collecting agents of whisky dealers, who may thus evade the law and convert an express office into a warehouse and saloon in every local option district of the Commonwealth.

The power of the State Legislature of Kentucky to

enact this law, and to prohibit the acceptance of the pay for such packages as appears by the terms of said statute, or as it is made to read by the construction placed upon it by the Supreme Court in Kentucky, is not in conflict with the commerce clause of the Federal Constitution.

Noble v. Mitchell, 164 U. S., 367 (41 : 472.)

Miller v. Cornwall Railroad Co., 168 U. S., 128 (42 : 409.)

Carstairs v. Cochran, 193 U. S., 11 (48 : 596.)

THE "C. O. D." AMENDMENT.

The construction and interpretation of sub-section 4 of section 2557b, Kentucky Statutes, by the Supreme Court of Kentucky is that it neither prohibits a bona fide shipment and delivery in a local option district of an interstate commerce package of whisky shipped C. O. D. or otherwise, nor a shipment and delivery in a local option district of a package of whisky ordered from a point within the State where the sale is not prohibited and shipped into a local option district otherwise than as a C. O. D. package.

McDermott v. Commonwealth, 29 Ky. Law Rep., 750.

Adams Express Co. v. Commonwealth, 29 Ky. Law Rep., 904.

Said sub-section, *supra*, as construed and interpreted by said court, was intended by the Legislature of the State to prevent an evasion of the local option law by fraud, deception, trick or device. Before its passage, under the decision of said court in the case of James v. Commonwealth, 102 Ky., 108, the whisky dealers of the State made some sort of arrangements with the

common carriers of the State, by which said common carriers acted as the agents of said whisky dealers in the sale of and collection for their whisky in every local option district of the State; and in this way they evaded the law. As most of the parties who purchased the whisky in such local option districts were miners and irresponsible persons, the whisky dealers would not send it except C. O. D. Hence, to make the law effectual, the Legislature passed the act amending the law, by providing that the delivering of the whisky or the acceptance of the money for said C. O. D. packages was a sale thereof within the meaning of the local option law. As thus construed, said local option law is not in conflict with the interstate commerce clause of the Federal Constitution.

Whether or not the whisky in question was shipped, delivered, or the pay therefor received under an arrangement between the plaintiff in error and its unknown consignor, who is known in the record as "Lock-box No. —, Cincinnati, Postoffice, Ohio," was a question of fact; and whether or not the plaintiff in error entered into the arrangement by which it held, delivered and accepted the C. O. D. charges on said packages, was a trick, device, fraud or deception for the evasion of the local option law, or a bona fide transaction, was a question of fact; and the decision of the Supreme Court of the State on these questions of fact, is not subject to review by this court, and presents no Federal question.

In the case of Castillo v. McConnico, 168 U. S., 674 (42 : 624), the court said:

> "A Federal question is not presented to this court for review, although decided by the State

court, if questions of a purely State character were passed upon by that court, which are sufficient to sustain its decree, wholly independent of the Federal question. * * *

"The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

The Erie Railroad Co. v. Purdy, 185 U. S., 148 (46 : 847), was in error to review a judgment of the Supreme Court of New York under the mileage book act, which was claimed to be repugnant to the Constitution of the United States as it was a regulation of commerce between the States. The act was construed by the Supreme Court of New York not to apply to interstate commerce but to intrastate commerce only.

It was there held:

"No Federal question is presented by a claim in a State court that a State statute is inconsistent with the power of Congress to regulate commerce among the several States, where the judgment of the State court sustaining the validity of such enactment proceeds on the theory that the statute is intended to, and does, apply only to domestic transportation."

THE LEGISLATURE HAS THE POWER TO DETERMINE WHETHER OR NOT THE SALE OF WHISKY IS DETRIMENTAL TO THE PEACE, MORALS AND WELFARE OF THE PEOPLE.

The general rule is that there is no limitation upon the legislative power of the Legislature of a State,

except those found in its Constitution; and it has been many times decided by this court that neither the Federal Constitution nor the 14th amendment took from the States those powers of police to protect the lives, liberty and property of its citizens, and to promote their health, morals, education, peace and welfare. In speaking of where and by whom the police power of the State shall be put in force, this court in the case of Mugler v. Kansas, 123 U. S., 678 (31 : 210), said:

> "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

In the case of Reymann Brewing Company v. Brister, 179 U. S., 450 (45 : 274), the court said:

> "It was for the Legislature to determine the form of the traffic that required to be regulated as a source of evil."

Hence, by sub-section 4, section 2557b, the Legislature

of Kentucky determined that the form of the traffic in local option districts, through and by means of C. O. D. packages shipped therein, was the evil to be regulated; and in the exercise of its police power provided that the delivery of such packages or the acceptance of the pay therefor in such district, was, within the meaning of the law, a sale therein, and the party so doing was liable under the law.

ACCEPTANCE OF C. O. D. CHARGES PROHIBITED.

Sub-section, 4 section 2557b, provides that the acceptance of the money, or delivery of the C. O. D. package, is prohibited, and is unlawful, and constitutes a sale thereof at the place where the money is paid or the goods delivered.

The Commonwealth contends that, while this statute does not apply to the delivery of an interstate transportation which is delivered in a reasonable time in the due course of business, it does prohibit the acceptance of the C. O. D. charges by the plaintiff in error, and that it does not thereby regulate or interfere with interstate commerce, because the collection of said charges is not necessary to the freedom of said transportation and delivery of such packages, and does not form a part thereof. It does not incidentally affect such transportation.

As the State court said:

> "Appellant cannot shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract,

and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent."

Am. & Eng. Ency. of Law, vol. 12, p. 553.

On this subject it is said:

"There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, expressed or implied."

Cox v. Columbus, &c., Co., 91 Ala., 392.

McNichol v. Pacific Express Co., 12 Mo. App., 401.

The collection of said charges, not being a part of the interstate transportation and being unlawful under the prohibition laws of the State, and the appellant being presumed to know the law, its contract to collect said charges will not be protected by the interstate commerce clause of the Federal Constitution as it was not intended to be a shield for criminals.

THE COMMONWEALTH HAVING MADE A PRIMA FACIE CASE, THE BURDEN WAS ON THE PLAINTIFF IN ERROR TO SHOW THAT THE ACCEPTANCE OF THE C. O. D. CHARGES, OR THE DELIVERY OF THE PACKAGE, WAS A PART OF INTERSTATE TRANSPORTATION.

The Supreme Court of this State in its opinion said:

"When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. * * * The defendant cannot say that it did not know the transaction

was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county that the State law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. * * * As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce."

"State v. Robinson, 49 Maine, 285.

"In this case four baskets of champagne were seized under the laws of the State, and the question arose, whether or not, they being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said:

"It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct; and the exceptions must be overruled."

"Commonwealth v. Zelt, 139 Pa. St. Rep., 615.

"This case in principle involved the same question as the Maine case above cited. The court, on the question in hand, said:

"The fourth assignment is not sustained. The fact that defendant Porter was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the Commonwealth's case. This is substantially what the court below said to the jury."

State v. Miller, 53 Iowa, 87.

Orme v. Commonwealth, 21 R., 1412.

Rice on Evidence, section 260, p. 425.

NO JURY.

A jury having been waived in case No. 332, and the cause having been submitted to the trial court without the intervention of a jury the judgment therein, is, under the practice in Kentucky, the verdict of a properly instructed jury.

Ellison v. Commonwealth, 6 R., 306.

City of Mt. Sterling v. Holly, 22 R., 358.

Civil Code, section 332.

Said section of the Civil Code above cited reads:

> "Upon trials of questions of fact by the court it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

There was no request of the court for the separation of its finding of fact from its conclusions of law, nor was this done, and there was no objection or exception made thereto. It is the contention of the State that the only question before the court in this case is the sufficiency of the indictment.

American Mut. Aid Society v. Bringer, 91 Ky., 406.

Kossett v. Snead, 21 R., 777.

Buler v. Sandidge, 20 R., 1581.

Day v. Adams, 20 R., 1827.

THE STATUTE IN QUESTION IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE, NOT INCONSISTENT WITH THE REGULATION OF COMMERCE BY CONGRESS.

The Supreme Court of Kentucky upheld the local option statute in question upon the ground, not only because, by the construction placed on it by said court, it did not apply to interstate commerce, but because it was a legitimate exercise of the police power of the State, not inconsistent with the power of Congress to regulate interstate commerce.

The plaintiff in error knew that the local option law of the State was in force at Barbourville, Ky., that the sale of whisky was prohibited therein, yet it has been engaged for 14 years receiving, holding, delivering and accepting the C. O. D. charges on such packages. It is the contention of the Commonwealth that this is nothing more than a trick, device and an evasion of the law by the plaintiff in error, and that it knew, or could have known that it was such, by the exercise of ordinary diligence.

In Schollenberger v. Penn., 171 U. S., 15 (43 : 54), the court had before it an act of the Legislature of Pennsylvania prohibiting the sale of oleomargarine which had been shipped into that State; and while the court held said act an attempt to regulate interstate commerce invalid, the court said:

> "In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State."

In the case of Plumley v. Mass., 155 U. S., 460 (39 : 223), the court had before it a statute of Massachusetts.

Plumley was convicted under said statute for the sale of oleomargarine in Boston, as the agent of a firm at Chicago, Ill. It was admitted that the oleomargarine was sent to him by said firm from Chicago, and sold by Plumley in the original package. It was claimed by him that said statute was repugnant to the clause of the Constitution providing that Congress shall have power to regulate commerce among the States. The question there was whether or not the statute in its application to sales of oleomargarine brought into that State from other States was in conflict with said clause of the Federal Constitution. The court said:

> "It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution *does not prohibit* the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that 'cause it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. * * *
>
> "Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?
>
> "We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the States to protect the morals, the health and safety of their people by

appropriate legislation sometimes touches, in its exercise, the line separating the respective domains of national and State authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connections with the social order, the health and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

Can it be that the interstate commerce clause of the Constitution of the United States was intended to secure to any one the right to ship a product into a Territory and sell it when the State, in the exercise of its reserved rights and under its police power, had prior thereto declared that such product is detrimental to the morals, peace and welfare of its people, and had prohibited such sale? Does the right to regulate legitimate commerce between the States confer upon Congress the right to determine what is or is not detrimental to the peace, morals and welfare of the people of the several States?

This court has declared time and again that such was not the interpretation and construction to be placed on said interstate commerce clause.

In Sherlock v. Alling, 93 U. S., 108 (23 : 820), Justice Field said:

> "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

Kentucky Statutes, section 2557b, sub-section 4, was a remedial statute to prevent the evasion of the local option laws. In James v. Commonwealth, 102 Ky., 108, the Supreme Court of Kentucky had held that the *place of sale* was the place from which the whisky was ordered and shipped. Under this ruling the local option law was ineffectual to prevent the sale. The statute in question was not intended to regulate domestic or interstate commerce, but to fix the *place of sale* of such C. O. D. shipments "at the place where the money is paid or the goods delivered," and to fix the liability of persons who either receive the money or deliver the whisky.

As said in Sherlock v. Alling, 93 U. S., 108 (23 : 921):

> "Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In the case of Crossman v. Lurman, 192 U. S., 188 (48 : 401), the court had under consideration a statute of New York, which prohibits the sale within said State of adulterated food products, and the court then said that such statute

> "Does not, as applied to food *products imported* into the United Stated through the channels of foreign commerce, violate the commerce clause of the Federal Constitution, but is a valid exercise of the police power of the State to legislate for the benefit of its people in the prevention of deception and fraud." (Syllabus.)

INDICTMENT.

The sufficiency of the indictment herein was a question for the decision of the State court alone, and the ruling of the State court in overruling the appellant's demurrer thereto presents no Federal question.

Colwell v. Texas, 137 U. S., 699 (34 : 818).

Davis v. Texas, 139 U. S., 657 (35 : 302).

Bergemann v. Backer, 157 U. S., 655 (39 : 846).

Howard v. Fleming, 191 U. S., 127 (48 : 124).

THE FINDINGS OF FACTS.

One of these cases was submitted to the court on the law and facts without the intervention of a jury, but without a request for a separation of the court's findings of fact from its conclusions of law.

The other case was submitted on the instructions of the court to the jury for its findings of the facts.

In either case the facts must be taken as found, and presents no question for review.

Missouri, K. & T. R. Co. v. Haber, 169 U. S., 629 (42 : 887).

Western U. T. Co. v. Call Publishing Co., 181 U. S., 90 (45 : 770).

Telluride P. T. Co. v. Rio Grand W. R. Co., 187 U. S., 566 (47 : 307).

In the case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S., 222 (48 : 948), Justice Bewer said:

> "It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the *conclusions of the highest court of a State upon questions of fact.*"

In the case of Minneapolis & St. Louis Railroad Co. v. Minnesota, et al., 193 U. S., 553 (48 : 619), Justice McKenna said:

> "It is well established that on error to a State court this court cannot re-examine the evidence, and when the facts are found, we are concluded by such finding."

In the case of Eastern Building & Loan Asso. v. Ebough, 185 U. S., 119 (46 : 833), the court said:

> "This is a writ of error to the State court, and *whatever was a question of fact there is a question of fact here.* * * * This court, and other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, *whatever was matter of fact in the court where judgment or decree is under review, is matter of fact here.*"

In the case of Jenkins, et al. v. Neff, et al., 186 U. S., 220 (46 : 1142), the court said:

> "Findings of fact in State courts are on writ of error conclusive with us."

Thayer v. Spratt, 189 U. S., 350 (47 : 848), in this case, Justice Peckham writing, the court holds that it is without jurisdiction to review the evidence upon which the findings of the State court rest, on writ of error:

> "We are precluded by the finding of facts in the State court from looking at the evidence upon which such findings may rest. Upon a writ of error to a State court this court *has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence*"

Telluride Power Transmission Co. v. Rio Grade W. R. Co., 187 U. S., 569 (47 : 307).

In the case of Western Union Tel. Co. v. Call Pub Co., 181 U. S., 92 (45 : 771), the court said:

> "But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court."

Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S., 625 (44 : 299).

Bartlett v. Lockwood, 160 U. S., 356 (40 : 455).

Hedrick v. Atchison, T. & Santa Fe R. R. Co., 167 U. S., 674 (42 : 321).

JURISDICTION.

The Federal question presented in the State court was that the local option statute of the State, as amended by sub-section 4, section 2557b, was, and is, repugnant to the interstate commerce clause of the Federal Constitution. The decision of the Supreme Court of the State was that this statute did not apply to interstate shipments; that neither the prohibition law nor said amendment undertakes to regulate interstate commerce, and that the Legislature had not attempted to do so by the statute in question; that it was not necessary to a determination of the appellant's liability that the State court should decide whether or not said statute was repugnant to said commercial clause; and then decided the case on another ground against the appellant, to-wit: That said sale and delivery was not an interstate commerce transaction, but, from the evidence, it was a trick, device, fraud and deception by which the local option laws of the State were evaded. Hence there is no Federal question presented for review, and this court is without jurisdiction.

Eustis, et al. v. Bolles, et al., 150 U. S., 361 (37 : 1111). In this case the court said:

> "It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.
>
> "It is likewise settled law that, where the record

discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Harrison v. Martin, 171 U. S., 37 (43 : 63).

New Orleans v. New Orleans Water Works Co., 142 U. S., 79 (35 : 943).

Before this court can be asked by the appellant to determine whether or not the local option law of Kentucky is repugnant to the commerce clause of the Federal Constitution, it must have been determined necessarily, first, that the transaction in question was an interstate commerce transaction, and the acceptance of the C. O. D. charges or the delivery of said packages was a part of the interstate transportation; but whether or not such acceptance of said C. O. D. charges or the delivery of said packages was a part of said interstate transportation, was a question of fact to be determined from the evidence by the State court, and said court having decided it was not an interstate commerce transaction, and this court being without jurisdiction to pass on the weight or sufficiency of the evidence, there is no question of law which it can review.

In the case of Dower v. Richards, 151 U. S., 661 (38 : 307), the court said:

> "The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the deci-

sion of the State court upon the question of fact is not within the jurisdiction of this court.

"In the legislation of Congress, from the foundation of the government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. * * *

"Upon such a writ of error this court, as is well settled, can not review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury. * * *

"That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

"In Campau v. Lewis (1865), 70 U. S., 669 [3 Wall., 106] (18 : 211), a decision of the State court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a Federal question would have been presented. * * *

"There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." * * *

CONCLUSION.

All will agree that there comes a time when the act of transportation from one State to another ceases to be interstate commerce. Can the carrier indefinitely hold the articles transported in its warehouse, and without notifying the consignee or consignor, thus prevent the articles mentioned in the Wilson act from becoming subject to the laws of the State enacted in pursuance of its reserved powers for the protection of the health and welfare of its people?

The Commonwealth contends that, when the transportation of such articles has reached its termination, and the articles have been tendered to the consignee, or they have been held for such reasonable time in the usual course of business as would permit a delivery, the act of transportation ceases to be interstate commerce; and if the common carrier then stores them and afterwards delivers them, or accepts C. O. D. charges, it is subject to the State law.

Wherefore we ask that the judgment in each case be affirmed.

N. B. Hays,
Chas. H. Morris,
For Defendant in Error.

APPENDIX.

JUDGMENTS AND DECREES OF STATE COURTS ON WRIT OF ERROR.

United States Compiled Statutes 1901, section 709:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, at their dis-

cretion, award execution, or remand the same to the court from which it was removed by the writ."

LOCAL OPTION LAWS.

Kentucky Statutes 1903.

§ 2557. *Penalty for Selling in Violation of Law—Or Furnishing House or Room to Sell in.*—After the entry of the certificate of the canvassing board as above provided for, in the order book of the county court, if the vote was given against the sale, barter or loan of spirituous, vinous or malt liquors in the said county, city, town, district or precinct, as the case may be (there seems to be an omission here—Ed.), to any person, except as hereinafter provided; and any person who shall sell, barter or loan, directly or indirectly, any such liquors in said county, city, town, district or precinct shall, upon conviction, be fined not less than sixty nor more than one hundred dollars, or be confined in the county jail for not less than ten nor more than forty days, or both so fined and imprisoned, in the discretion of the court or jury, for each offense; and any person who knowingly furnishes or rents a house, room, wagon or any conveyance or thing, in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than sixty nor more than one hundred dollars, and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same.

§ 2557a. *Intoxicating Beverage—Penalty for Selling—What Constitutes Sale.*—It shall be unlawful for any one

to sell, barter or loan, directly or indirectly, any beverage, liquid mixture or decoction of any kind which produces or causes intoxication, in any county, city, town district or precinct, in which the sale, barter or loan of spirituous, vinous and malt liquors is or shall be prohibited in accordance with the local option law. Any person who shall sell, barter or loan, directly or indirectly, any such beverage, liquid mixture or decoction in any such county, city, town, district or precinct shall, upon conviction, be fined the sum of not less than twenty nor more than one hundred dollars for each offense; and any sale, barter or loan of any article, with the agreement, expressed or implied, that the right or title to or possession of any such beverage, liquid mixture or decoction shall also pass, shall be considered a sale, barter or loan within the terms of this act.

§ 2557b. 1. *Indictment—Allegations of.*—In an indictment for a violation of any provision of the act approved March 10th, 1894, entitled "An act whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether spirituous, vinous or malt liquors shall be sold, bartered, or loaned therein," or for a violation of any act amendatory thereof, it shall not be necessary to allege that a vote was taken or an election held, or any other step relative thereto; but it may be simply stated that the act, or acts, charged were committed in a territory where the said act was in force; and in said indictment it shall be sufficient to designate said act as the local option law.

2. *Penalty for Selling or Having Possession of Liquor —U. S. Revenue Stamp Evidence of Guilt.*—It shall be unlawful for any person to sell, lend, give, procure for,

or furnish to another, any spirituous, vinous or malt liquors, or to have in his possession spirituous, vinous or malt liquors, for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than fifty nor more than one hundred dollars, and imprisoned not less than ten nor more than fifty days.

The possession of a United States special tax stamp (commonly called United States license) for carrying on the business of a retail dealer in spirituous, vinous or malt liquors, or the having of such tax stamp or license stuck up at the place of business in such territory, shall be *prima facie evidence of guilt under this section.*

3. *Bond for Good Behavior.*—On the second or any subsequent conviction for a violation of said act, or any of its amendments, the court shall require the defendant to execute bond in the sum of two hundred dollars to be of good behavior for the period of twelve months.

The court may, in its discretion, increase the amount of the bond, and if the bond is not given the defendant shall be committed to the county jail for a period not exceeding ninety days, to be fixed by the court.

4. C. O. D. Shipments—Where Sale Takes Place —All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called "C. O. D. shipments," into any county, city, town, district or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof.

§ 2569. *Delivery by Agents of Liquor Shipped—Penalty.*—That it shall be unlawful for an owner, operator, agent, clerk, occupant or other person of any depot, storehouse, warehouse, storeroom, office, steamboat, wharfboat, or other place situated or being in any county, town, city, district or precinct in this Commonwealth wherein the sale of spirituous, vinous, malt or intoxicating liquors are, at the time prohibited by law, to deliver any such liquors to, or receive pay for same from, any person except the party to whom the same has been billed or shipped, and to whom the same is addressed; and any one so offending shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense.

§ 2570. *Trick or Device to Evade Law.*—No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option laws prevailing in any county, town, city, precinct or municipality of this Commonwealth.

§ 2571. *Evidence Upon Which Conviction May be Had.*—A conviction for the offense of selling spirituous, vinous or malt liquors without license so to do, or for selling same in any county, town, city, precinct or municipality of this Commonwealth where local option laws prevail, may be sustained against the person in possession of the premises on which said liquor is obtained, furnished or disposed of in violation or evasion of law, if the following facts appear: A house, room, inclosure or other place where spirituous, vinous or malt liquors are furnished or obtained in violation or evasion of law, or where some

device is used to dispose of, furnish or obtain such liquor in violation or evasion of law.

§ 2572. *Person in Possession of Premises—Penalty.*—The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever on conviction, shall be fined not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished or disposed of.

DECISIONS OF THE COURT OF APPEALS OF KENTUCKY.

ADAMS EXPRESS CO. v. COMMONWEALTH.

(Filed June 17, 1905.)

27 Kentucky Law Reporter, 1096.

Local Option—C. O. D. Shipments—Knowledge of Carrier—Agreement to hold for Consignee—Liability.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Adams Express Co., a common carrier, was indicted, tried and convicted in the Laurel Circuit Court for the offense of unlawfully, willfully and knowingly shipping, procuring for, furnishing, selling and delivering spirituous liquor, by C. O. D. shipment, to one George Meece, at East Bernstadt, in Laurel county, the

sale of such liquor being prohibited by certain statutes enacted by the Legislature of Kentucky, approved April 4, 1884, March 10, 1894, and March 11, 1902. These acts were then in force in the five counties of Laurel, Rockcastle, Jackson, Owsley and Clay. The trial jury fixed the punishment of appellant at a fine of $60, on which judgment was duly entered, and the lower court having overruled its motion for a new trial, it prosecutes this appeal.

In Crigler v. Commonwealth, 27 Ky. Law Rep., 918, it was held by this court that what is known as the "Five Counties Act" of April 4, 1884 (Acts 1883-4, chapter 598, volume 1, page 1116), forbidding the sale of liquors in the five counties named therein, is in force in Laurel county as is the local option law of March 10, 1894, together with the amendment thereto of March 11, 1902 (section 2557, Kentucky Statutes), and that the two acts last mentioned must be construed as a part of the act of 1884, regulating and controlling the former as to procedure, the quantity of liquor sold to constitute an offense, and the punishment; that is, it was held that the local option act of 1894, as amended by that of 1902, is operative in Laurel county without the necessity of a vote by the people, and that of the existence of the act of 1884, and the operation of that of 1894, as amended in 1902, this court will take judicial notice. The fine inflicted against appellant was imposed under the act of 1894, as amended in 1902. (Section 2557, Kentucky Statutes.)

Sub-section 4, section 2557, Kentucky Statutes, which is also a part of the general local option law as amended in 1902, provides: "All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, com-

monly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The offense of which appellant was convicted is the one denounced by the foregoing section, and it is insisted for it that the alleged sale of spirituous liquor, for which it was indicted and convicted under the statute, was a mere delivery of the liquor by it as a common carrier in the usual course of business, and the money paid its agent by the consignee was in satisfaction of the amount due the consignor therefor upon a sale thereof made in the State of Ohio, which appellant, as a common carrier, was under the contract of shipment compelled to collect and remit consignor upon delivery of the goods; and further, that the transaction was authorized and appellant protected, by the law and regulations of interstate commerce.

The case went to the jury upon the evidence of the Commonwealth alone, none having been introduced by the appellant. The undisputed facts established by the evidence were:

1st. That George Meece within a year before the finding of the indictment called at appellant's office in East Bernstadt with his brother, who had ordered and was expecting from Cincinnati a package of whisky which he found awaiting him in appellant's office.

2d. While in the express office George Meece was informed by appellant's agent in charge that a package containing a gallon of whisky was then in the office for him, the charge upon which was $3.85. He then informed

appellant's agent that he had not ordered the whisky, was not expecting it, and had not the money with which to pay the charges thereon, but if satisfactory to the agent, and the latter would hold the whisky for him until the following Saturday, a week later, he would at the express office, pay for the whisky and take it away, to all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent $3.85 for the gallon of whisky, received and took it away.

3d. The agent knew that the package contained a gallon of whisky (i. e., four quart bottles), and that it was shipped by Crigler & Crigler, of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whisky.

4th. The agent also knew the business of Crigler & Crigler, and that they were in the habit of shipping almost daily by express, C. O. D., to appellant's East Bernstadt office, packages of both whisky and brandy, consigned to persons of that community. In view of the foregoing facts it becomes necessary to determine whether, in holding the whisky a week at Meece's request, and until the latter again called at the office, paid the necessary charges and took it, the appellant continued in the relation of carrier to the goods; or did it, by the transaction in question, cease to be a common carrier and become a mere bailee or warehouseman.

On this point Hutchinson on Carriers, 2d edition, sec. 354, states the general rule as follows: "The law upon this subject may, therefore, be stated to be that, so long as the carrier continues in the relation of carrier to the goods, he is under an absolute engagement that they shall be delivered only to the person to whom they are consigned; but that when from any cause he ceases to hold

them as carrier, and becomes a mere warehouseman or bailee, the degree of responsibility resting on him becomes changed, and from that moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and diligence."

In section 356 of the same book it is said: "It, therefore, frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a bailment. It may be stated, as a general rule, that when the carrier has done all the law requires him to do towards delivery, and from any cause he fails to effect it, and the goods are continued in his possession, he from that time becomes responsible only as depositary."

In further elaboration of this doctrine the author in section 385 tells us: "But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for them and take them in a few days, and request the carrier to keep them until he is ready to pay for them, the carrier becomes a warehouseman of the goods, and if they are lost or destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor."

A similar view of the doctrine, supra, was announced by this court in Wald & Co. v. Louisville, Evansville & St. Louis R. R. Co., 92 Ky., 645. So we may accept it as the law of this State. When a package marked "C. O. D.," (collect on delivery) is received by an express company for shipment, it is manifestly upon the condi-

tions that such company, as a common carrier, shall promptly deliver it to the consignee, collect of the latter a specified sum therefor, and with equal promptness return it to the consignor. Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking are permitted to charge, and are paid more for the transportation of goods than are railroad companies. A failure, therefore, upon their part to immediately, that is, in a reasonable and customary time, deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman.

In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor, appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was, or could have been, protected in the transaction by the law of interstate commerce. We are aware that section 5958, Revised Statutes of the United States, confers upon railroad and express companies authority to carry freight from one State to another free from interference on the part of the States, and that the Supreme Court of the United States, conconstruing this statute and defining the power of congress with reference to its right "to regulate commerce with foreign nations, among the several States and with the Indian tribes," has repeatedly held "that State legislation which seeks to impose a direct burden upon inter-

state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress."

It has also been held by the same court that when intoxicating liquors are shipped from one State to another by express C. O. D., upon an order or instructions from the purchaser residing in such other State, the contract of sale is to be regarded as completed in the State from which the shipment is made, upon the vendors there delivering the goods to a common carrier, although with the directions to collect the price from the consignee before its delivery to him, and that the right of the importer to thus sell and ship liquors in unbroken packages in another State exists regardless of the local laws of such State prohibiting such sales and shipments, and notwithstanding the provisions of the act of congress, known as the "Wilson Bill," which was intended to enable the several States, under the exercise of the police power, to enact such legislation as would give them the same control over intoxicating liquors shipped therein from other States after their arrival, whether in original packages or otherwise, as they might exercise over those of home manufacture or production.

But in the case at bar the conviction of appellant was not in violation of any regulation of the laws of interstate commerce. It sold and delivered to Meece a gallon of whisky and received of him $3.85 as the price of such sale, all with full knowledge of the fact that it had not been ordered by him. Furthermore, though appellant may have originally received the package of whisky as a common carrier, at the time of its sale it, as before stated, did not sustain to the package of whisky, or to the consignor or consignee, the relation of carrier, but that of bailee or warehouseman. In other words, the sale was

not made in another State, or by a shipper therein, but by appellant at East Bernstadt, in Laurel county, Kentucky, and in violation of the laws of the State which, by sub-section 4 of section 2557, Kentucky Statutes, makes such sale a misdemeanor.

Whatever ground may be urged for holding that this statute is imperative as to a shipment of spirituous liquors into this State from another State made by the vendor, upon an order received in such other State from the purchaser in this State, it certainly can not be void as to a sale wholly made and consummated in this State by a bailee after the whisky was received from another State.

Being of opinion that appellant's conviction was proper, the judgment is affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH (No. 1835).

(Filed April 27, 1906.)

29 Ky., Law Rep., 234.

Local Option—Non-resident—Shipping Whisky into Local Option County in Kentucky—Liability of Carrier.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant was indicted by the grand jury of Knox county, Kentucky, for a violation of the prohibition law prevailing therein. The indictment contains much surplusage with reference to what is called the C. O. D. statute, and as to the manner in which the Adams Express Co. received the whisky said to have been sold by it in contravention of law.

Stripped of all unnecessary verbiage, the indictment

contains a statement sufficient to charge the defendant company with a sale of liquor by retail, in violation of the prohibition statute applicable to Knox county; and as to the unnecessary allegations, they may be dismissed from view under the shelter of the maxim, *utile per inutile non vitatur*.

The defendant company pleaded not guilty, and the case was submitted to the court on the law and facts, the intervention of a jury being waived, resulting in an adverse judgment against it.

The evidence showed, for the Commonwealth, the delivery by the defendant's agent, J. A. Owens, to one J. D. Main of a gallon of whisky, for which he paid $3.85, which the agent at once transmitted to the shipper of the whisky in Cincinnati; also that Main did not order the whisky, and did not know the name of the consignor, but it was shipped to him at Barbourville, Knox county, Kentucky, from Cincinnati by the Adams Express Co., C. O. D. This is but a small part of a general system prevailing, by which unscrupulous dealers in whisky undertake, through the facile aid of express companies, to evade the prohibition laws in effect in certain counties in the State, and retail liquor therein in violation of the laws forbidding such traffic. By this system the names of men accustomed to drink whisky are obtained by the dealers, and then, without any order therefor, or any contract whatever, the whisky in gallon packages is sent to various small towns throughout the prohibition counties, addressed to the parties whose names are thus acquired. The express company does not notify the involuntary consignee, but simply holds the whisky in its warerooms, and the party in whose name the liquor had been expressed receives notice, either by postal from the con-

signor, or by some local agent of his in the county, that there is an express package for him, and then whenever the thirst for liquor becomes sufficiently strong to tempt him to pay the express charges and take it out of the express office this is done. The name of the consignor is not known by the involuntary consignee, and the address for the return of the money is the number of a lock box in Cincinnati postoffice. After the involuntary consignee becomes sufficiently acquainted with the system existing between the consignor and the express company, he finds that a gallon of liquor is generally kept at the express office subject to his order and the payment of charges, and he goes there for it with the same confidence that he would go to an ordinary dealer.

The evidence in this case shows that, within six months next before the trial, J. D. Main had taken from the Adams Express Co.'s office at Barbourville, Ky., as many as twenty separate packages of whisky of a gallon each, and the testimony of the express agent shows that he often had as many as fifty gallons of whisky on hand at one time consigned to various parties under the same system. Frequently several parties club in and take out whisky together, dividing it in proportion to the amounts paid in by each, it being a rigid rule of the defendant company never to deliver the whisky to any person other than the named consignee. It was stipulated between the Commonwealth and the defendant, that the whisky in question was shipped from Cincinnati in the ordinary course of the express business.

The first and crucial question in this case is, whether or not the shipment and delivery of the whisky was an act of interstate commerce. If so, it may be conceded that the defendant should go acquit; if not, it is

partically conceded that the acts of the defendant constituted a sale of liquor in Knox county, in violation of the prohibition law.

We do not think the amendment of the prohibition law commonly denominated the "Farris" or "C. O. D." law has any bearing upon the merits of the offense under discussion. The learned counsel for appellant hinge the whole defense on the fact that the act of the express company constituted the carrying on of interstate commerce, and the C. O. D. law, being an attempt to regulate interstate commerce, which admittedly is under the exclusive regulation of the Congress of the United States, is for that reason void. This may be conceded. However, if the C. O. D. amendment was stricken from the statute book entirely, it would not affect in any way the merits of the transaction under investigation as we see it. The prohibition statute, without the amendment, forbids, under penalty, the sale of liquor by retail in Knox county; but neither the statute itself, nor the amendment thereto, undertakes to regulate interstate commerce. No statute can affect interstate commerce, and the Legislature did not attempt to do so by that in question.

We do not agree to the proposition that the transaction, which took place between the express company and J. D. Main in Knox county, was interstate commerce. Nor do we agree with the attorney general in his view of the effect of the Wilson bill upon the transaction in hand. As we understand him, he insists that, although the shipment from Cincinnati be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept overtime in a wareroom, then the transaction ceases to be one of interstate commerce, and becomes one of

local commerce. We do not understand the Wilson bill as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided in the various cases cited in the briefs of counsel, that, where the whisky is purchased in a foreign State, it may be shipped by the seller to the buyer, into a State where the sale of liquor is prohibited by law; that it is interstate commerce unaffected by the local law until it is delivered to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refused to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the consignee. If the transaction be interstate commerce originally, it continues so until the goods are delivered into the hands of the consignee.

But was this transaction interstate commerce? No contract of purchase is even pretended to have been made in Cincinnati. So far as the consignor is concerned, he simply shipped his illegitimate goods into the State of Kentucky, to a point where the prohibition law prevails, and through the instrumentality of the express company there made a sale to J. D. Main. No one disputes, or can dispute, that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the

law. He shipped forbidden goods into a prohibition district of Kentucky for the chance of being able to sell it after it reached its destination, to Main. So far as he is concerned, the transaction in substance is the same as if he had brought the whisky himself to Barbourville, and there sold it to Main. This being true, the transaction was not interstate commerce.

The Commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction out of which grew the offense with which it stood charged was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whisky consigned to J. D. Main in Barbourville, Ky.; but this does not constitute interstate commerce; unless there was a bona fide shipment to a

real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce. In this case there was no bona fide shipment of merchandise from Cincinnati to Barbourville, but there was an illegal sending of whisky into Knox county through the instrumentality of the express company for the purpose of finding a buyer there. In its very substance, the unknown consignor, whose headquarters is a lock box in the Cincinnati postoffice, simply appointed the Adams Express Co. as his agent to find for him a purchaser in Knox county for a gallon of whisky on a given commission. The defendant can not say it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show, in defense of its otherwise illegal act in Knox county, that the State law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. Now, interstate commerce can not be based upon fraud or chicanery; it must necessarily be a legitimate transaction. The Constitution and Statutes of the United States are not shields for criminals; nor do they furnish a means by which crime may be effectuated. The Supreme Court of the United States does not uphold criminal acts, or protect criminals from the consequence of their misdoings. The transaction which took place between Cincinnati and Barbourville bears the same resemblance to interstate commerce as the wares of the green-goodsman bears to the genuine money of the United States; both are mere counterfeits. As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce.

In the case of State v. Robinson, 49 Maine, 285, four

baskets of champagne were seized under the laws of the State, and the question arose, whether or not, they being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said: "It is not pretended in the case at bar that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct and the exceptions must be overruled."

The case of Commonwealth v. Zelt, 138 Pa. St. Rep., 615, in principle involved the same question as the Maine case above cited. The court, on the question in hand, said: "The fourth assignment is not sustained. The fact that defendant, Porter, was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the Commonwealth's case. This is substantially what the court below said to the jury."

Suppose, instead of the defense being interstate commerce, it had been licensed, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, not that it honestly believed, but that it was the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were

legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant can not shelter itself under its common law duty as a common carrier of goods. There is no common law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent. In Am. & Eng. Ency. of Law, vol. 12, page 553, on this subject it is said: "There is no common law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied." (Cox, Hill & Thompson v. Columbus & Western Railway Co., 91 Ala., 392; James McNichol v. Pacific Express Co., 12 Mo. App. Rep., 401.)

But passing this, while there is no direct evidence upon which one could lay his finger and say this showed knowledge, or that showed knowledge on the part of the express company, that the business in which it was engaged was a criminal one, we think, taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on, systematically, a criminal business, and that the names given as consignees to the various packages of whisky shipped were fictitious. In other words, while there were real persons in Barbourville bearing the names used, these persons had no contract of purchase, but the whisky was shipped in their names with a view of tempting them to purchase it after its arrival in Barbourville.

Let it be remembered that Barbourville is a small town, scarcely above the dignity of a village, although it is the county seat of Knox county. It is a matter of common knowledge that in a small town there are no secrets; every man knows every other man; what he does; how he conducts himself, and what are his habits. The system under consideration had been carried on a long time. Owens, the express agent, states that he had been at Barbourville fourteen years; that during that time shipments of whisky have been received in the same way continuously. He admits that in no case did he ever notify any named consignee that there was a package for him. This tends to show he expected the party to be notified in other ways. Large numbers of similar packages were held by him constantly. He rigorously enforced the rule not to deliver a package to any one except the consignee. This showed him to be a formalist, and that he knew the advantage of surrounding the transaction with every semblance of legality; to borrow one of Edmund Burke's fine phrases, the transaction was made "most iniquitously legal."

We do not believe it possible for an illegitimate business to be carried on through the express company on so large a scale for so long a time, and especially where remittances were to be made to a lock box, instead of to a named firm, without its being ascertained that the system was criminal. Viewing the whole case, together with the large number of similar cases against the same defendant, involving the same facts, and which were all heard together, we are forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to con-

duct, and that the corporation itself was the accomplice, for pay, of the criminal consignors.

The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a very large number of the cases involving violent crimes which come to this court on appeal from that section of the State are directly caused by the use of whisky. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whisky can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

The judgment is affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH.

29 Kentucky Law Reporter, 904.

Opinion of the court by Judge Barker, reversing.

The appellant, the Adams Express Company, was indicted by the grand jury of Laurel county, charged with the offense of retailing liquor in that county contrary

to the local option law prevailing therein. A trial resulted in the appellant's being found guilty and a fine inflicted. From this judgment it appeals.

The evidence showed that the whisky in question was shipped C. O. D. from Cincinnati to East Bernstadt, in Laurel county, through the agency of the Adams Express Company. The package contained one gallon of whisky put up in four quart bottles, and was delivered to the consignee, William Caudell, upon the payment by him of the price of the liquor with the cost of transportation added. The evidence for the Commonwealth conclusively shows that the whisky was ordered by Caudell in Cincinnati, Ohio, and was shipped to him C. O. D. as before stated. The fact that the goods were ordered in Cincinnati takes this case without the principle enunciated in Adams Express Company v. Commonwealth, 29 Ky. Law Rep., 224, and brings it within the purview of the opinion of the Supreme Court of the United States in American Express Company v. Iowa, 196 U. S. Rep., 133, and Adams Express Company v. Iowa, Id., 147. There, upon facts in all essential particulars similar to those involved here, the Supreme Court, through Mr. Justice White, held that the shipment of the spirits was interstate commerce, and not subject to the control of prohibition statutes prevailing in Iowa.

Upon the authority of these opinions, the judgment in this case must be reversed with directions to dismiss the indictment; and it is so ordered.

McDERMOTT v. COMMONWEALTH.

(Filed September 21, 1906—Not to be reported.)

29 Kentucky Law Reporter, 750.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Nunn, reversing.

The appellant was indicted at the January term, 1906, of the Larue Circuit Court, charged with retailing spirituous liquor in quantity less than five gallons, in the town of Hodgenville, Ky., a territory where the local option law was then in full force and effect. At the May term of the court a trial was had and a fine of $60 was assessed against the appellant, from which this appeal is prosecuted.

Upon the trial of the case the Commonwealth introduced but one witness, Floyd R. Miller, who testified that he lived in the town of Hodgenville, Ky., that some time in November, 1905, he ordered four quarts of whisky from the appellant, a saloonkeeper, at Elizabethtown, Ky., over the telephone, he (Miller) being at Hodgenville and appellant at his place of business at Elizabethtown; that the appellant delivered the liquor to the agent of the American Express Co., at Elizabethtown, Ky., and was delivered by the express company to him at Hodgenville. It was not shipped C. O. D. (collect on delivery). Some time after this he paid the appellant for the whisky. It was agreed that Hodgenville was, in November, 1905, local option territory. The appellant then asked the court to give a peremptory instruction to the jury to find for him, which the court refused.

The court gave to the jury two instructions. The first was in the usual form in such cases. No. 2 is as follows: "A contract of sale by telephone between parties at

the time at Hodgenville and Elizabethtown, is to be deemed a sale in Hodgenville, for the purpose of this trial."

This amounted to a peremptory instruction by the court, to the jury, to find the appellant guilty.

We must apply the law to this case, as it existed at the time the alleged offense was committed, to-wit, November, 1905. The only question necessary to be determined is, where was the sale made, at Elizabethtown or Hodgenville? If made at Elizabethtown, the appellant should have been acquitted; if made at Hodgenville (local option territory), a fine was rightfully assessed against him. The case of Doores v. Commonwealth, in 28 Ky. Law Rep., 192, is conclusive of the question involved on this appeal. Doores was a legalized whisky dealer in Bowling Green, Ky. Emmet Williams, the prosecuting witness, resided in Glasgow, a town where the local option law prevailed. Williams, in that case, testified as follows: "I ordered a gallon of whisky from Doores in April, 1905. I either called him up on the phone or wrote to him at Bowling Green, Ky. He sent whisky from Bowling Green to me at Glasgow by Adams Express Co. I received it in Adams Express Co. office in Glasgow. After that I wrote him to send me my account. He did so, and I mailed him a money order to Bowling Green in payment."

This court said in that case: "We do not think this testimoney established a sale in Barren county, by the terms of the C. O. D. Statute, contained in section 2557b, Kentucky Statutes, for the reason that the whisky in question forwarded from Bowling Green to Williams at Glasgow, was not shipped C. O. D. There was no contract for the sale of the liquor made in Barren county. * * *

The question at last is, whether or not the sale was made in the county where the seller was at the time the order was received, or in the county where the witness received the liquor. If the principle announced in James v. Commonwealth prevails, clearly the sale was in Warren county; and this principle must prevail, unless the sale is controlled by the C. O. D. Statute; a conclusion we think precluded by the very language of the statute, which is limited in its operation to goods shipped C. O. D." In this case the trade was not completed when the conversation by telephone between the prosecuting witness and the appellant ceased. The title to the whisky yet remained in the appellant. It was necessary for him to separate four quarts of whisky from his other liquors and deliver them to the prosecuting witness, or to some one for him. It took this, at least, to complete the sale. The appellant delivered the four quarts of whisky to the agent of the American Express Co. at Elizabethtown. This act passed the title from the appellant, in this liquor, to the prosecuting witness. The Doores case, and the authorities therein cited, all agree that at the moment of the delivery of the article to the express company it becomes the agent of the purchaser.

In this case, the order was received by the appellant at his place of business, at Elizabethtown. The order was complied with by the appellant by delivering the liquor to the prosecuting witness' agent, the express company, at Elizabethtown. The trade was consummated there, and the lower court erred in not peremptorily instructing the jury to find for the appellant. The appellant's counsel contends that the action of the lower court was proper under the authority of the case of Adair v. The Commonwealth, 28 Ky. Law Rep., 659. The cases

are not alike. In that case the prosecuting witness, in the city of Mayfield, telephoned to a liquor dealer outside of the city boundary, to send him a keg of beer. The seller, by his conveyance and driver, carried the beer to the purchaser and delivered it to him in Mayfield. The purchaser offered to pay the driver, who was authorized to receive it, but refused until the purchaser went with him outside of the boundary of the city. This was clearly a trick or device to evade the law, and, further, the sale in that case was not complete until the beer was delivered to the purchaser or his agent, and that occurred within the city.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

AMERICAN EXPRESS CO. v. COMMONWEALTH.

30 Kentucky Law Reporter, 207.

(Filed December 5, 1906—Not to be reported.)

Appeal from Larue Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellant, American Express Co., was fined in the Hodgenville Police Court under a warrant charging it with selling spirituous liquors, to-wit: A gallon of whisky to one Richard Graham in the city of Hodgenville, where local option was in force. It thereupon took an appeal to the Larue Circuit Court, and upon the trial in that court was again found guilty by verdict of a jury and its punishment fixed at a fine of $100, and having been refused a new trial by the circuit court, it brings the case to this court by a further appeal.

The facts, as shown by the bill of evidence, were that Graham, the Commonwealth's witness, received notice by mail that there was a C. O. D. package for him at appellant's Hodgenville office; that he called at the office and obtained the package by paying appellant's local agent, Langley, the C. O. D. charge thereon of $3.85; that the package was in a box which had nothing on it to indicate its contents, or the name of the consignor; that no information was given him by the agent as to its contents and he, Graham, did not know what it contained when he received and paid for it, but upon opening the box, which he at once did, he discovered therein four quart bottles of whisky, and he and the agent each took a drink from one of the bottles, the latter being invited by him to do so. Graham further testified that he had not ordered the whisky, was not expecting it, and did not know the consignor, nor had he previously ordered or received whisky in that way.

Langley, appellant's agent, testified that he did not know the box contained whisky until so informed by Graham, after the latter had received, paid for and opened it, and that there were no words or marks upon the box to indicate its contents.

Appellant did not introduce or take the deposition of its Cincinnati agent, who received the box of the consignor in that city, or its train messenger in whose charge it was carried to Hodgenville. It did, however, take and read on the trial the deposition of M. E. Stone, of Cincinnati, manager of the company which shipped Graham the whisky in question, who testified in substance, that the company's name is Old Kentucky Falls Distillery, its chief office and place of business Cincinnati, and that it has no office or place of business in Kentucky; that he,

as manager of the company, shipped the whisky upon an order from Graham, which was received by mail. It does not appear from the deposition whether it was Kentucky whisky, though the witness admitted his company dealt in Kentucky whisky, but when asked if the package shipped Graham was Kentucky whisky his answer was, "I can not recall."

The witness also stated that he could not say whether appellant's Cincinnati agent who received the package knew its contents, but that in delivering to him the whisky for shipment he gave the agent no "specific" notice that the "package contained liquor, or that it was to be carried into a local option district."

In addition to the above synopisis of Stone's testimony we quote from his deposition the following questions asked him and his answers thereto:

> "Q. 14. Tell how this trade was opened up by you in Hodgenville?"
>
> "A. I do not recall."
>
> "Q. 15. Did you receive Richard Graham's name from any one before the shipment; if so, who sent it?"
>
> "A. I do not recall."
>
> "Q. 16. Did you have any arrangement either directly or indirectly with any one at Hodgenville, or elsewhere, by which you came into possession of the name of said Graham preparatory to this shipment?"
>
> "A. I do not recall any such arrangement."
>
> "Q. 18. Did you receive this name and others to whom you shipped at this place, and which enabled you to open up your trade in this town without previous arrangement on your part or other officers of your firm? If so, tell how you came by them?"
>
> "A. I do not recall."
>
> "Q. 19. Do you know by what method Richard

Graham's name became known to your firm? If so, state in minute detail?"

"A. I do not."

"Q. 20. Was this shipment a mere venture to see what customers would take out the goods?"

"A. This shipment was made on the strength of an order received from Richard Graham."

"Q. 27. Does your firm send agents or salesmen into such local option territory, and did you in this case to collect prospective customers? If you did, who was the agent or salesman in this case, and where is he now?"

"A. I do not recall sending any salesman into that territory."

"Q. 33. Why did you send the package without any advertisement on the outside?"

"A. I don't know that we did."

The alleged order on which Stone claimed to have shipped the whisky to Graham was exhibited without the envelope in which it was sent. It exhibits no post mark, but its language is as follows:

"Order sheet of Old Kentucky Falls Distillery, 322, 323, 326 McFarland street, Cincinnati, Ohio.

"Date March 21, 1905. No. of order 74.

"Ship C. O. D. by Am.....Express charges prepaid.....

.....

Gallons.	Quarts.	Name of Goods.	Price C. O. D.
	4	Ky. Falls	$380

.....

Name of purchaser, Richard Graham.
Shipment to (Name of town) Hodgenville.
Postoffice, Hodgenville.
County.....State, Kentucky."

Richard Graham was re-called and the second time asked as to his knowledge of the above order, and denied that he had written, signed or seen it, and was equally positive that he had not authorized any one to write, sign or make the order for him. Indeed, he denied on his examination in chief that he had ever heard of the Old Kentucky Falls Distillery Co., or its manager, until he got all the whisky shipped him. He also testified that though he had seen no one taking orders for whisky in Hodgenville before the package in question was received by him, there was a man soliciting such orders just afterwards. Langley, appellant's local agent, admitted that he prepared and placed in the Hodgenville postoffice the postal card notifying Graham of the arrival of the package and requesting him to call and get it. Upon being required to produce in court the book kept in the express office for entering the receipt and delivery of packages, its entries showed that the package shipped to Graham was received at the Hodgenville office April 17, 1905, and delivered to Graham on the 18th, whereas, it was received at the office March 24, 1905. On the 27th of March the notice of its being there was mailed by Langley to Graham, and the latter took it from the office March 29th, 1905. It is patent from the discrepancies referred to that the entries in the book were not made as of the dates respectively on which the whisky was received and delivered.

At the conclusion of the evidence for the Commonwealth, and again after all the evidence was introduced, appellant moved the court to peremptorily instruct the jury to find it not guilty, but both motions were overruled, and the court instructed the jury as follows:

"1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, The American Express Co., in the city of Hodgenville, Larue county, Kentucky, within twelve months before the issual of the warrant herein, sold whisky in less quantity than five gallons at one time to Richard Graham, and received from Graham the charge therefor, you should find the defendant guilty as charged in the warrant, and fix its punishment at a fine in any sum not less than $60 nor more than $100, or at confinement in the county jail for any time not less than ten days, nor more than forty days, or at both such fine and imprisonment.

"2. The court further instructs the jury a delivery of said whisky in Hodgenville C. O. D. was a sale, unless said whisky had been ordered by said Graham previously of the consignor, M. E. Stone.

"3. If the jury believe from the evidence that Richard Graham sent to M. E. Stone at Cincinnati, Ohio, a written order to ship to him said whisky at Hodgenville, and that said Stone shipped said whisky to Graham by the American Express Co., and said express company delivered said whisky to Graham and collected the charge therefor, they should find defendant not guilty.

"4. If the jury believe from the evidence that defendant, American Express Co., did not know, nor had reasonable grounds to believe, that the package delivered contained whisky, they should find for defendant.

"5. If they have a reasonable doubt of the defendant having been proved guilty, they should find him not guilty."

It is insisted for appellant that it was error to refuse the peremptory instruction, and more so to instruct the jury as was done by the trial court, and this contention rests upon the theory that the shipment of whisky, on

account of which appellant was found guilty under the warrant, was interstate commerce, and, therefore, can not be regulated or interfered with by a trial and conviction of appellant under the laws of this State as attempted in this case. We can not sustain this contention if, in truth, the transaction here presented was a mere selling of whisky in a local option territory through the instrumentality of the express company.

If there was any evidence in this case that the whisky was not ordered by Graham from the Cincinnati company; that the pretended order therefor upon which his name appears was a forgery, and that the appellant express company knew it was whisky when received and delivered by it, the verdict should be permitted to stand. There was evidence on both sides of these several propositions, but the jury had the right to accept the statements of Graham that he did not know and had never heard of the Cincinnati company before receiving the package in question; that he had never ordered any whisky of them, and had never signed the written order or authorized it to be written or forwarded, as against the statements of Stone, the manager of the Cincinnati shipper, that he had received the order.

In the long and evasive deposition of the latter no fact is stated that conclusively contradicts Graham. Stone was not even acquainted with Graham, and no attempt was made to prove by the latter's neighbors or acquaintances that the order was in his handwriting. Graham can not be prosecuted for receiving and paying for the whisky, his connection with the transaction offered no inducement to him to suppress or misrepresent the facts, nor had he any interest in the result of the prosecution against appellant. But this was not true of the position

occupied by Stone, or appellant's agent, Langley. The jury also had the right to reject the testimony of appellant's agent, Langley, and to conclude that there was enough in the circumstances connected with the shipment of the package to show knowledge on his part or that of appellant's other agents through whose hands it passed, that it contained whisky. For it would do no violence to appellant's rights to presume that it had some knowledge of the business of so valuable a patron as a Cincinnati whisky house, and that in accepting a shipment from such a concern its agents would make some effort to discover what it was. The fact that the box containing the whisky was unmarked by the brand of the shipper or with the name of the place from which it was shipped, and the further fact that in accepting it for shipment appellant assumed responsibility for its safe delivery, and would, therefore, be liable for its value if lost, was sufficient to put them upon inquiry as to its contents. No doubt the jury also attached some significance to the fact that appellant did not give itself the benefit of the testimony of its receiving agent at Cincinnati, or of the messenger who had charge of the package from the time it left Cincinnati until it reached Hodgenville, that they might acquit themselves and it of the imputation of knowledge as to its contents.

It may be said here, as held in Adams Express Co. v. Commonwealth, 92 S. W., 932: "The Commonwealth proved facts which of themselves established the guilt of the defendant company." It showed the existence of the prohibition law in the town of Hodgenville, the delivery of liquor by appellant to Graham, and the payment of the price by the latter to its agent. These facts make a case for the Commonwealth, unless appellant's explanation of

the transaction presented such a defense as took it out of the statute, the burden of showing which was upon it. If the jury were of the opinion that this was not done by the evidence, it had the right to find appellant guilty.

It is argued that though it be conceded that appellant, by its agents, knew the package in question was whisky, as it had the right to assume that it had been ordered by the consignee, and that the shipper, after effecting the sale in Cincinnati, was simply shipping it for delivery in due course, there was nothing in the transaction to warn appellant of its illegality. It does, however, appear from the evidence that Graham failed to call for or inquire about the package until notified of its arrival, which would not have been probable if he had ordered and was expecting it, and that when he went for it he asked appellant's agent whence it came and what it contained, before it was paid for or delivered to him. This was sufficient to indicate to the agent that he had not ordered it, and that the shipment was not a bona fide one.

The case at bar differs from that of Adams Express Co. v. Commonwealth, supra, only in the fact that in the latter the defendants were proved to have made a score or more deliveries of whisky in local option territory upon illegal shipment from Cincinnati, which were held to give it knowledge of the illegality of the system it was instrumental in maintaining, whereas, in the case at bar, there was but the one sale.

We are unable to see that this difference makes appellant less guilty, if in fact it knowingly aided the shipper to violate the law. In Adams Express Co. v. Commonwealth, 27 Ky. Law Rep., 1096, it was held that a conviction of the defendant for one such transaction was proper, it being shown that it knowingly delivered to the

consignee, in a local option district, whisky which he had not ordered, and collected of him the price thereof.

We do not feel at liberty to say that the verdict of the jury is without support from the evidence, and in our view of the law the instructions were proper. If such a transaction as is here presented is permitted it would not only render impossible the enforcement of prohibition in local option districts, but would also, in large measure, place the retailing of spirituous liquors in this State in the hands of irresponsible foreign dealers, who, though not themselves amenable to the jurisdiction and process of the courts of the State, can, through their willing instruments, the express companies, violate its laws with impunity. We can not afford to set in motion such a train of evils.

Judgment affirmed.

cient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and of course the company was under no obligation to offer testimony in support of that which the State admitted to be the fact.

We do not mean to intimate that an express company may not also be engaged in selling liquor in a State contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.

Much as we may sympathize with the efforts to put a stop to the sale of intoxicating liquors in defiance of the policy of a State we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion.

No. 332.

Adams Express Company, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[May 13, 1907.]

Mr. Justice BREWER delivered the opinion of the Court.

This case differs from the preceding in the fact that it was tried by the court without a jury. In all other respects it is substantially the same.

There was the same averment in the indictment; and more than that, there was an express stipulation made between counsel pending the trial in these words:

"It is further agreed at this point that the whiskey about which the witness testified was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier, and carried by it to Barbourville, Kentucky, by the method commonly known as C. O. D."

There is nothing, therefore, to distinguish this case in principle from the preceding, and the same judgment will be entered in this as in that.

No. 583.

American Express Company of New York, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[May 13, 1907.]

Mr. Justice BREWER delivered the opinion of the Court.

This case, like the two preceding, was a prosecution of the express company for a violation of the Kentucky statute in respect to "C. O. D." shipments. It was tried in the Circuit Court before a jury, which returned a verdict of guilty and fixed the penalty at one hundred dollars fine, which verdict was sustained and judgment entered thereon by the Circuit Court. The company appealed to the Court of Appeals, which affirmed the judgment, 97 S. W. Rep. 807, 30 Ky. Law Reporter, 207, and thereupon the case was brought here on writ of error.

The consignee testified that he did not give an order for the shipment, while there was testimony on behalf of the consignor that such an order was filed with it in the name of the consignee and the shipment made upon that order. The brief of the Attorney General in the Court of Appeals, after referring to the testimony of a witness on behalf of the company, said:

"It will appear from his evidence that he resides in Cincinnati, Ohio, and is manager for a wholesale liquor firm located in said city; that on March 21st, 1905, he received an order filed as an Exhibit 'X' from Richard Graham of Hodgensville, Ky. for an order of whiskey to be sent C. O. D., for the delivery of which the warrant herein was issued against the appellant company; that upon this order the whiskey in question was